DENIED APR 21 1924

No. [redacted]

SUPREME COURT OF THE UNITED STATES

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

vs.

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

[redacted]
Counsel for Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

DEAR SIRS:

PLEASE TAKE NOTICE that upon the annexed petition and brief of and on behalf of the Eastman Kodak Company of New York, and a certified copy of the transcript of the record in this cause, including the proceedings in the United States Circuit Court of Appeals for the Fifth Circuit, submitted herewith, an application will be made to the Supreme Court of the United States, at a term of said court appointed to be held at the Capitol, Washington, D. C., on Monday, the 14th day of April, 1924, at the opening of the court on that day or as soon thereafter as counsel can be heard, for a writ of certiorari to be directed to the said United States Circuit Court of Appeals for the Fifth Circuit, to review the judgment of said Court made and entered in the above cause on or about the 19th day of December,

Supreme Court of the United States

OCTOBER TERM, 1923.

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1923, to the end that the said judgment may be set aside, reversed and annulled, and that such further proceedings in said cause may be had as to justice shall appertain.

Dated, Atlanta, Georgia, March 8th, 1924.

JOHN W. DAVIS,
ALEXANDER W. SMITH,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Attorneys and of Counsel
for the Petitioner.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Eastman Kodak Company of New York, a New York corporation, respectfully shows to the Court as follows:

I.

1. On or about the 19th day of December, 1923, a final judgment was made and entered by the United States Circuit Court of Appeals for the Fifth Circuit, affirming a final judgment for $28,743.98 in favor of the respondent and against the petitioner, which latter final judgment was made and entered in the District Court of the United States for the Northern Division of the Northern District of Georgia on or about the 30th day of Septem-

ber, 1922, in an action at law wherein petitioner was defendant and the respondent was plaintiff.

2. *A writ of error directed to said United States Circuit Court of Appeals for the Fifth Circuit to review said final judgment has been allowed by Mr. Justice Sanford upon a petition filed by this petitioner.* A supersedeas bond given by petitioner has been approved, and the writ of error and a citation thereon have been issued, served and returned to this Court in accordance with law. Petitioner was advised that the cause was probably not one in which the decision of the Circuit Court of Appeals would have been final save for the power of this Court to grant a certiorari, but on further consideration of the facts in the cause and of the statute in such case made and provided, petitioner conceives that there may be a doubt upon this point and as to whether a writ of error was the proper remedy for petitioner in the premises, and, therefore, for greater certainty petitioner prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to bring up its said final judgment for review in this Court, because of the importance of the questions involved and on the special ground of the necessity of avoiding conflict between two or more United States Circuit Courts of Appeals, inasmuch as an important and outstanding question in the cause has been decided in one way in the United States Circuit Courts of Appeals for the Second and Third Circuits respectively, and by the said United States Circuit Court of Appeals for the Fifth Circuit in exactly the opposite way.

ESSENTIAL FACTS.

II.

3. Petitioner is a New York corporation engaged in the manufacture of photographic goods and having its principal place of business in the City of Rochester, State of New York. Respondent is a Georgia corporation having its principal place of business in the City of Atlanta, State of Georgia, and has been engaged since 1901 in different locations in Atlanta in the business of selling photographic goods to professional photographers and amateurs (Rec., 149).

In February, 1915, respondent brought this action against the petitioner to recover damages claimed to have been sustained by respondent through breaches of the Act of Congress passed July 2, 1890, commonly known as the Sherman Act (Rec., 4) alleged to have been committed by petitioner. The case was tried before Honorable Samuel H. Sibley, United States District Judge, and a jury, during the month of September, 1922, at Atlanta aforesaid, in the Northern Division of the Northern District of Georgia, and a verdict was returned in favor of the respondent in the sum of $7,914.66, which being trebled, and an allowance of $5,000 attorneys' fees having been made by the Court, the above named judgment resulted (Rec., pp. 61-2).

4. Down to the month of November, 1911, as to photographic goods manufactured by it under secret processes (Rec., 360, 640), and down to the month of June, 1913, as to photographic goods covered by its Letters Patent (Rec., 361, 644), petitioner carried on its business under a system whereby such goods were sold by it under restrictive contracts designated as "Terms of Sale," according to which such goods could be resold by the petitioner's customer only at prices fixed by the

petitioner, while the customer also agreed not to handle goods which competed with the restricted goods sold to him by the petitioner. Prior to the commencement of this action, a suit had been brought by the United States against petitioner and others for alleged violations of the Anti-Trust Acts of the United States, which suit terminated in a decree adjudging that petitioner had been guilty of monopoly (Rec., 542-545). In the trial of the present cause it was alleged and maintained by the respondent that petitioner's said system of restrictive contracts or Terms of Sale was unlawful, especially in view of said decree, which was pleaded by the respondent and admitted in evidence. In 1901 respondent became a regular customer of the petitioner and fully accepted its said restrictive system as the same developed (Rec., 204-5); repeatedly approved of such system (Rec., 204-5; 228); contracted to maintain the same (Rec., 211); realized large profits through a long period by its acquiescence in and conformity to petitioner's said system; when called to account for sundry violations of the Terms of Sale, apologized profusely, promised future compliance and re-affirmed its intention to comply with the Terms of Sale in all respects (Rec., 230); and on numerous occasions reported violations of such Terms of Sale by other dealers (Rec., 215-18; 223-4). Respondent finally ceased to be a customer of petitioner in April 1910, up to which time it had continuously conformed to such Terms of Sale ever since 1901 (Rec., 165-9). Thereafter petitioner did not sell any goods of its manufacture to the respondent.

5. Upon the trial respondent, claiming to recover for damages alleged to have been sustained by it in its business, by being prevented from purchasing peti-

tioner's goods at dealers' prices, such damages to cover the period from April, 1910 to the beginning of the action, was permitted to offer proof of profits alleged to have been made by respondent from the sales of petitioner's goods prior to April, 1910, and to use such proof as a standard for measuring profits which respondent claimed to have lost after April, 1910, upon sales which it would have made of petitioner's goods had it not been prevented from handling the same. Petitioner, in its answer and on the trial, and also in its argument on its appeal below, averred and maintained that, if petitioner's system of doing business under such Terms of Sale was unlawful, then the respondent throughout the period during which it was petitioner's customer was *in pari delicto* with the petitioner, and that, hence, the amount of the profits earned by respondent during the earlier period could not be used as a standard by which to measure damages alleged to have been sustained by respondent in the period for which it was allowed to recover; that, inasmuch as the whole of the respondent's claim for damages rested upon such proof of earlier profits, there was no competent proof of damages in the record.

The Circuit Court of Appeals for the Fifth Circuit, in its decision affirming the judgment of the court below, held that the point just stated was not well taken, and that the respondent was not *in pari delicto* with the petitioner, saying (Rec.,):

> "There was evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the alleged monopoly, and, therefore, was not *in pari delicto* with the defendant. The jury could well have believed that the plaintiff complied with defendant's restricted terms of re-sale for the reason that otherwise the plaintiff could not purchase or secure the goods necessary

> in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

The United States Circuit Court of Appeals for the Third Circuit held to the contrary on the precise question in *Victor Talking Machine Company* v. *Kemeny*, 271 Fed. 810, where Woolley, *C. J.*, *said* at page 819:

> "* * * We are constrained to hold that the learned Trial Judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

The facts in the case last cited were closely analogous to those in the instant case and the questions involved were identical.

The United States Circuit Court of Appeals for the Second Circuit has also decided the same question in accordance with the position here taken by petitioner, in the case of *Eastman Kodak Company* v. *Blackmore*, 277 Fed. 694, at page 699 where Mayer, *C. J.*, said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny*, *supra*, at pages 818 and 819."

In this last cited case, the plaintiff-in-error was the present petitioner and the alleged illegal system referred to was the very same as that which is the subject of the instant case. Defendant-in-error, Blackmore, in the case just cited, had, like the respondent in the instant case, operated for a long period under the identical Terms of Sale which are here under consideration, in all practical respects as did the respondent in the instant case.

III.

At no time prior to the commencement of this action did the petitioner have in the State of Georgia any office or place of business or plant for the manufacture of products, or any warehouse for the storage or display of its goods, or property of any kind connected with its business, or branch house or agent residing in that State nor did it transact business in that State (Rec., 677; 697-8; 724; 734; 746). It has never registered as a non-resident corporation for the purpose of doing business in the State of Georgia (Rec., 734-5). When this action was begun, it had no employees in the State of Georgia except travelling salesmen, who from time to time visited dealers in that State as well as those in other States, and took orders from them, which orders were transmitted to the home office of the petitioner at Rochester in the State of New York or to its branch office in New York City (Rec., 683-697, 704-5); and except what are called "demonstrators," whose duties are described below. None of petitioner's travelling salesmen maintained a fixed office or place of business within the State of Georgia (Rec., 704-5); but visited that State and other states about four times a year (Rec., 704, 718). All orders taken by salesmen were passed upon as to their credit and were

accepted or rejected solely at the petitioner's office at Rochester in the State of New York or at its branch office in New York City (Rec., 719-20; 735-6). The duties of a demonstrator consist in calling on consumers and showing them how to use the goods and endeavoring to show them the superiority of Eastman goods (Rec., 682). These demonstrators maintained no office or place of business within the State of Georgia, had no connection with sales and did not take orders for the petitioner nor solicit orders of any sort, but in some cases, as an accommodation to a photographer, would take orders from a photographer to be sent, and which they did send, to dealers to be filled (Rec., 684-5; 705-6). Service of process in the action was attempted to be made upon the petitioner by delivering copies thereof to the Treasurer of petitioner at Rochester in the State of New York aforesaid (Rec., 660), whereupon, the petitioner, claiming that it was not a resident of and was not doing business in the State of Georgia and that it was not found in said State and had no agent there, appeared specially, traversed the return of the Marshal, moved to quash said return and the said attempted service and filed a plea to the jurisdiction (Rec., 661). After the taking of proofs, the District Court overruled petitioner's plea and the traverse of the service and motion to quash (Rec., 779, 666) with leave to the petitioner to plead to the merits (Rec., 667), which petitioner thereafter did. On the argument in the Circuit Court of Appeals, petitioner renewed its motion to quash and to dismiss the case on the grounds that the Trial Court had acquired, as aforesaid, no jurisdiction of the petitioner.

IV.

QUESTIONS PRESENTED.

6. The following questions of law, with others, are raised in the case:

(a) Whether, assuming that petitioner's system of doing business through its restrictive Terms of Sale, as heretofore described, was unlawful, the respondent, having conformed to and obtained the advantages of said system down to April, 1910, and having been up to that date an active and voluntary participant in the unlawful acts of the petitioner, if such they were, was not during said period *in pari delicto* with the petitioner, and if so, whether the respondent should have been allowed to prove profits made by it during the period when it was so *in pari delicto,* as a standard by which to measure damages alleged to have been sustained by the respondent after it had ceased to be petitioner's customer.

(b) Whether at the time of the commencement of the action petitioner resided or was found in the State of Georgia or was transacting business in said State, and whether the attempted service of process upon petitioner was not void, and whether the Court has or had any jurisdiction of the alleged cause of action, in view of the premises.

V.

Your petitioner presents herewith, as part of this petition, a transcript of the record in said cause in the United States Circuit Court of Appeals for the Fifth Circuit and refers to the Assignment of Errors filed by petitioner on its application for said writ of error and makes the same a part of this petition.

Your petitioner, therefore, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record in said cause and of all proceedings of said Circuit Court of Appeals, which were entitled in that cause, or directing that the transcript of the record and proceedings returned in obedience to the writ of error stand as the return to the writ of certiorari; to the end that said cause may be reviewed and determined by this Court as provided by law; and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said final judgment of the said Circuit Court of Appeals be reversed and set aside, and that such other proceedings in the cause shall be had as to justice shall appertain.

And your petitioner will ever pray, etc.

Dated, March 8, 1924.

EASTMAN KODAK COMPANY OF NEW YORK,

By Geo. Eastman

JOHN W. DAVIS,
ALEXANDER W. SMITH,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Of Counsel for Petitioner.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss.:

FRANK L. CRAWFORD, being duly sworn, says: That he is one of counsel for the EASTMAN KODAK COMPANY OF NEW YORK, the petitioner herein; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

FRANK L. CRAWFORD.

Sworn to and subscribed before me this 12th day of March, 1924.

FRANCES I. SIMS,
Notary Public,
New York County No. 278.
Register's No. 4062.
Commission expires March 30, 1924. (L. S.)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923.
No. 781.

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

John W. Davis,
Alexander W. Smith,
Frank L. Crawford,
Clarence P. Moore,
Counsel for Petitioner.

INDEX TO CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1923.

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	No. 781.

PETITIONER'S BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

I.

The petitioner is a New York corporation engaged in the manufacture of photographic goods, and having its principal place of business in the City of Rochester, State of New York. The respondent is a Georgia corporation engaged in the sale of such goods and having its principal place of business in the City of Atlanta, Georgia. Petitioner has done no business in the State of Georgia. (See petition page 9.) This action was brought to recover damages, and damages have been awarded to the respondent, as a result of alleged breaches of the Sherman Act by the petitioner. For some nine years respondent continuously participated in the system by which petitioner carried on its business, and if this system was

illegal, petitioner claims and has at all points in the litigation claimed and maintained that respondent was an active participant in the petitioner's alleged wrongdoing, and was, therefore, *in pari delicto* with the petitioner; that hence the amount of profits earned by the respondent during the period when it was a customer of the petitioner cannot be used as a standard to measure damages alleged to have been sustained by respondent for the period for which respondent was allowed to recover; and that inasmuch as the whole of respondent's claim for damages rested upon such proof of earlier profits, there was no competent proof of damages in the record. The Court of Appeals for the Fifth Circuit held otherwise, thus creating a conflict between that Court and the Courts of Appeals for the Second and Third Circuits, in which the precise question has been decided in accordance with the position here taken by petitioner.

II.

This Court will grant a writ of certiorari to review the final judgment of a United States Circuit Court of Appeals, where the case is one in which, under the statute, the decision of the latter Court would have been final save for the power of this Court to grant a certiorari and where the question involved is important, or where the necessity of avoiding conflict between two or more United States Circuit Courts of Appeals demands that such writ be granted.

Forsyth v. *Hammond*, 166 U. S. 506, 514.
St. Louis, K. C. & C. RR. Co. v. *W. RR. Co.*, 217 U. S. 247, 251.
Diamond Rubber Co. of New York v. *Consolidated Rubber Tire Co.*, 220 U. S. 428.
Carpenter v. *Winn*, 221 U. S. 533, 543.

III.

Where there is doubt whether a writ of error is the proper remedy, it is the correct practice to petition also for a writ of certiorari, the Court postponing the consideration of this petition until the hearing on the writ of error.

Spiller v. *Atchison, T. & S. F. R. Co.*, 253 U. S. 117, 120.

Phila. & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

Bullock v. *R. R. Comm. of Florida*, 254 U. S. 513.

IV.

A review of the judgment of the Circuit Court of Appeals is necessary in order to avoid conflict between the Circuit Court of Appeals for the Fifth Circuit on the one hand, and the Circuit Courts of Appeals for the Second and Third Circuits, respectively, on the other, in respect to the following question:

Whether, assuming that petitioner's system of doing business through its restrictive Terms of Sale, as described in the petition, was unlawful, the respondent, having conformed to and obtained the advantages of said system down to April, 1910, and having been up to that date an active and voluntary participant in the unlawful acts of the petitioner, if such they were, was not during said period *in pari delicto* with the petitioner, and if so, whether the respondent should have been allowed to prove profits made by it during the period when it was so *in pari delicto*, as a standard by which to measure damages alleged to have been sustained by the respondent after it had ceased to be petitioner's customer.

That there is such conflict in regard to this question is clearly shown by the following:

The Circuit Court of Appeals for the Fifth Circuit, in its decision affirming the judgment of the Court below, held that the point just stated was not well taken, and that the respondent was not *in pari delicto* with the petitioner, saying (Rec.):

> "There was evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the alleged monopoly, and, therefore, was not *in pari delicto* with the defendant. The jury could well have believed that the plaintiff complied with defendant's restricted terms of resale for the reason that otherwise the plaintiff could not purchase or secure the goods necessary in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

The United States Circuit Court of Appeals for the Third Circuit held to the contrary on the precise question in *Victor Talking Machine Company* v. *Kemeny*, 271 Fed., 810, where Woolley, *C. J.*, said at page 819:

> "* * * We are constrained to hold that the learned Trial Judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

The facts in the case last cited were closely analogous to those in the instant case and the questions involved were identical.

The United States Circuit Court of Appeals for the Second Circuit also decided the same question in accordance with the position here taken by petitioner, in the case of *Eastman Kodak Company* v. *Blackmore*, 277 Fed. 694, at page 699 where, Mayer, *C. J.* said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny, supra*, at pages 818 and 819."

In this last cited case, the plaintiff-in-error was the present petitioner and the alleged illegal system referred to was the very same as that which is the subject of the instant case. Defendant-in-error, Blackmore, in the case just cited, had, like the respondent in the instant case, operated for a long period under the identical Terms of Sale which are here under consideration, in all practical respects as did the respondent in the instant case.

V.

(*a*) Mere participation and acquiescence by the respondent in petitioner's unlawful system, if such it was, made the respondent a party to the wrongdoing and itself a violator of the Sherman Act.

Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227.

Bluefields Steamship Co. v. *United Fruit Co.*, 243 Fed. 1, 13, 18; C.C.A. 3rd Cir., June 26, 1917.

Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 816-17; C. C. A. 3rd Cir., March 4, 1921.

Eastman Kodak Company v. *Blackmore*, 277 Fed. 694; C. C. A. 2nd Cir., Dec. 14, 1921.

Cooley on Torts, p. 254.

Bluefields Steamship Company v. *United Fruit Co.*, 243 Fed. 1, was decided by the Circuit Court of Appeals for the Third Circuit in June, 1917. In that case plaintiff had gone into a combination with the defendant, but becoming dissatisfied with defendant's conduct of the business, sued the defendant for damages. It was held that the plaintiff could not recover, inasmuch as the evidence showed that the plaintiff had participated in, acquiesced in and ratified the acts complained of. Woolley, *C. J.*, says at page 13:

> "* * * If the things complained of were things agreed to or acquiesced in, then manifestly, if they were unlawful, the plaintiff was *in pari delicto* and was without right to recover."

and again at page 18:

> "If the Sherman Act was violated by the combination in which the Bluefields Company participated, and injury to that Company was a natural consequence, then the case comes within the well-settled principle that where a criminal combination is made or a criminal enterprise is undertaken by two parties and either party violates the agreement with injury to the other, the law will afford the injured party no redress but will leave him as it finds him. *In pari delicto potior est conditio defendantis.*"

Eastman Kodak Company v. *Blackmore*, 277 Fed., 694, was decided by the Circuit Court of Appeals of the 2nd Circuit, December 14, 1921. In that case,

plaintiff Blackmore, who had been a customer of the defendant, Eastman Kodak Company, under the very system and Terms of Sale involved in this case, had been dropped from its list of customers by the defendant, which had thereafter refused to sell Blackmore, and he had, in consequence, sued for damages. The facts in the case were almost identical with those in the instant case. Participation in the alleged wrongful system was proved by the same class of evidence as that which the present record discloses, as appears from the statement of facts prefixed to the opinion of Mayer, *C. J.*, 277 Fed. page 696.

At pages 698-9, Judge Mayer says:

> "If, on the other hand, it be assumed (and we find it unnecessary to decide this point) that defendant's restrictive system was at all times here concerned unlawful, then the question is whether a participant in an unlawful system of doing business can, as matter of law, recover damages while at the same time participating in the unlawful system. As applied to the facts of this case, the question is whether plaintiff, as a participant after 1908, will be permitted to recover damages alleged to have been suffered during that period when during that very period for which he seeks redress he was an active wrongdoer, if defendant was a wrongdoer.
>
> The rule is tersely stated by Gray, *J.*, in *Hall* v. *Corcoran*, 107 Mass., 251, 253, (9 Am. Rep. 30) as follows:
>
> 'The general principle is undoubted that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part'. * * *

> *In Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1, especially at pages 13 *et seq.* and 19, 155 C. C. A. 531, the court pointed out, in effect, that one who is *in pari delicto* in cases such as that at bar, cannot recover, and the same principle is discussed in *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A.), 271 Fed., 810, 816. See also, *McMullen* v. *Hoffman*, 174 U. S. 639, 654, 19 Sup. Ct. 839, 43 L. Ed. 1117, and *Cooley on Torts* (3d Ed., 1906), vol. 1, pp. 254-261. Further citation is unnecessary because of the many cases cited in the cases referred to *supra*.
>
> The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of doing business after 1908 and took such advantages as sprang therefrom, he may nevertheless recover damages caused, as he claims, during the period when he and defendant were both wrongdoers. With this proposition we are unable to agree."

The above decision in *Eastern Kodak Co.* v. *Blackmore* is thus an exact precedent for this defendant and a complete authority for the position that, so long as the plaintiff was defendant's customer, it was *in pari delicto* with the defendant and subject to all the consequences which flowed from that relation.

To the same effect, *Victor Talking Mach. Co.* v. *Kemeny*, 271 Fed. 810, 816-17.

(*b*) Nor was it correct to say as stated by the Circuit Court of Appeals for the Fifth Circuit in its opinion in the instant case:

> "The jury could well have believed that the plaintiff complied with defendant's restricted terms of resale, for the reason that otherwise the plaintiff could not purchase or secure the goods necessary in the conduct of its business. The plaintiff was a small concern and its approval or disapproval of defendant's method of doing business was a matter of no moment."

It is believed that the authorities are unanimous to the effect that the mere fact that a customer needed the goods and could not get them otherwise than from an offending manufacturer, does not avail the customer as an excuse for engaging in an illegal combination, nor do such facts constitute legal coercion.

> *Radich* v. *Hutchins*, 95 U. S. 210, 213.
> *Chesebrough* v. *United States*, 192 U. S. 253, 259.
> *Dennehy* v. *McNulta*, 86 Fed. 825 C. C. A. 7th Cir. May 2, 1898.

In *Dennehy* v. *McNulta* the plaintiff purchased liquors from an illegal combination of distillers, which issued to its customers rebate vouchers by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on the condition that they purchase exclusively from the combination during that time.

On account of the control of distillery products possessed by the defendants, it was deemend a business necessity on the part of the plaintiffs to make all their purchases in that line from the distributors of the combination, or, as stated in the argument of their counsel, it "became impracticable and detrimental to their trade to buy liquors elsewhere" in the face of the monopoly (p. 827). Plaintiff sought to recover the amounts paid on certain rebate vouchers, claiming that the payment had been made under constraint or duress. Holding that no actual duress was shown, and no grounds on which to base the recovery, the Court said (p. 829):

> "At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases

> from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed."

Certiorari in this case was refused by the United States Supreme Court, 176 U. S., 683.

VI.

The amount of the profits earned by respondent during an earlier period when respondent was a participant in petitioner's unlawful acts and was, therefore, *in pari delicto* with the petitioner cannot be used as a standard by which to measure damages alleged to have been sustained by respondent in the period for which it was allowed to recover:

Victor Talking Machine Co. v. *Kemeny,* 271 Fed., 810, 819 (C.C.A., 3rd Cir. Mar., 1921). (See page 4, *supra*).

Eastman Kodak Co. v. *Blackmore,* 277 Fed., 694, 699 (C.C.A., 2nd Cir. Dec., 1921). (See page 5, *supra*).

Murray v. *Interurban Street Railway Co.,* 118 A. D. 35 (N. Y. App. Div., 1907).

McNeal v. *Farmers' Market Co.,* 43 Pa. Superior Ct. 420 (1910).

Raynor v. *Valentine Blatz Brewing Co.,* 100 Wisc., 414.

There being no other proof of damages in the record than that based upon the proof of the profits alleged to have been earned by respondent during the period

when it was a customer of the petitioner and a participant in and supporter of petitioner's alleged illegal system, there is no competent proof of damages in the record.

VII.

Petitioner did not and does not reside and was not found in the State of Georgia, nor was it at the time of the commencement of the suit, or on any previous date, transacting business in such state; hence, the attempted service of process upon the petitioner was void and the Court had no jurisdiction of the alleged cause of action.

People's Tobacco Co. v. *American Tobacco Co.*, 246 U. S. 79, 85-87.
Philadelphia & Reading Ry. Co. v. *McKibbin*, 243 U. S. 264.
Rosenberg Bros. & Co. v. *Curtis Brown Co.*, 260 U. S. 516; 43 Sup. Ct. Rep. 170.
Minnesota Commercial Men's Ass'n v. *Benn*, 261 U. S. 140; 43 Sup. Ct. Rep. 293.

VIII.

In view of the important questions involved in the case and of the necessity of avoiding conflict between different United States Circuit Courts of Appeals, as disclosed by the petition and the foregoing argument, petitioner again asks that a writ of certiorari be issued as prayed for in the petition.

JOHN W. DAVIS,
ALEXANDER W. SMITH,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 270 ~~317~~ 316

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Defendant-in-Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF-IN-ERROR.

JOHN W. DAVIS,
FRANK L. CRAWFORD,
CLARENCE P. MOSER,
Attorneys and of Counsel for Plaintiff-in-Error.

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Supreme Court of the United States

OCTOBER TERM, 1924.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EASTMAN KODAK COMPANY OF NEW YORK, Plaintiff-in-Error, AGAINST SOUTHERN PHOTO MATERIAL COMPANY, Defendant-in-Error.	No. 270.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of the Case.

First.

This case is here on a writ of error to the Circuit Court of Appeals for the Fifth Circuit to review the final judgment of that Court (Rec., 741).

Second.

The plaintiff-in-error (defendant below) is a New York corporation, having its principal place of business in the City of Rochester, State of New

York. The defendant-in-error is a Georgia corporation, having its principal place of business in the City of Atlanta, State of Georgia. The action was brought by the defendant-in-error (plaintiff below), to recover damages claimed to have been sustained by it through breaches of the Sherman Act, (Rec. 4), alleged to have been committed by the plaintiff-in-error. The case was tried before Honorable Samuel H. Sibley, *District Judge*, and a jury at Atlanta, in the Northern Division of the Northern District of Georgia. The jury returned a verdict in favor of the defendant-in-error for the sum of $7,914.66, which being trebled, and an allowance of $5,000, attorneys' fees, having been made by the Court, a final judgment resulted in favor of the defendant-in-error and against the plaintiff-in-error for the sum of $28,743.98 (Rec. 61-62). A writ of error to review such final judgment having, on the petition of plaintiff-in-error, been issued by the Circuit Court of Appeals for the Fifth Circuit, the judgment was by such Court affirmed, and a final judgment affirming the same entered on or about December 19th, 1923 (Rec. 736). To review said final judgment last named, the writ of error herein was issued.

Third.

The right of the plaintiff-in-error to such writ of error, and the jurisdiction of this Court in this case, depend upon two grounds, to-wit:

(1)—That the plaintiff-in-error at the time of the commencement of the case did

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NOTE:—Unless otherwise stated, all references are to the printed pages of the record, and all italics are those of counsel.

not reside and was not found and had no agent in the State of Georgia, nor was it transacting business in such State, for which reason the attempted service of process upon the plaintiff-in-error was void, and the Court below had no jurisdiction in the premises.

(2)—The case is one in which the judgment of the Circuit Court of Appeals is not made final by the provisions of the Judicial Code and in which the matter in controversy exceeds one thousand dollars besides costs.

After the issue of the writ of error, the plaintiff-in-error, conceiving that there might be a doubt as to whether a writ of error was the proper remedy in the premises, filed a petition for a writ of certiorari to the Circuit Court of Appeals, to bring up the said final judgment of that Court for review in this Court because of the importance of the questions involved, and on the special ground of the necessity of avoiding conflict between two or more United States Circuit Courts of Appeal, inasmuch as an important and outstanding question in the case had been decided in one way in the Circuit Courts of Appeal for the Second and Third Circuits respectively, and in exactly the opposite way by the said Circuit Court of Appeals for the Fifth Circuit. Upon consideration, however, this Court denied said petition for a writ of certiorari.

Fourth.

THE ISSUES.

The chief issues here in controversy are as follows:

(1) Whether the Court below had jurisdiction in the premises.

(2) Whether the defendant-in-error (plaintiff below), which throughout the period during which it was a customer of plaintiff-in-error (defendant below) was an active and voluntary participant in the alleged combination, conspiracy and other alleged unlawful acts which the plaintiff-in-error was charged with conducting and committing, was not, therefore, during said period, *in pari delicto* with the plaintiff-in-error, and whether, therefore, the defendant-in-error was not, and is not, barred from using as a standard by which to measure damages alleged to have been sustained by it in the period for which it was allowed to recover, the amount of profits claimed to have been earned by it during an earlier period when it was so *in pari delicto*, and whether, therefore, the record does not fail to present any legal proof of damages.

(3) Apart from the above, whether the record does not fail to present any such proof of damages as is required by the rulings of this Court in order to sustain a recovery.

(4) The defendant-in-error having failed to prove affirmatively that the refusal of plaintiff-

in-error to sell to defendant-in-error at dealers' discounts after April, 1910, was made for a monopolistic reason, whether such refusal constituted a legal wrong which could form the basis of recovery by defendant-in-error.

Fifth.

THE FACTS.

I.—As to the Statute.

The suit is brought under the Sherman Act, Section 7, which provides that a suit authorized by such section may be brought "in the district in which the defendant resides or is found." Section 4 of the Clayton Act provides that such a suit may be brought "in the district in which the defendant resides or is found or has an agent." Section 12 of the same Act provides that such a suit may be brought against a corporation in any district wherein the defendant "may be found or transacts business," and that "all process in such cases may be served in the district of which it (the defendant) is an inhabitant, or wherever it may be found."

II.—*As to Jurisdiction.*

In the case at bar, process was first attempted to be served upon the agent of a local concern, which in no way represented the plaintiff-in-error. The service, however, was abandoned, having been adjudged invalid (Rec. 659), and a new service was subsequently attempted to be made at Rochester, New York, upon the treasurer of the plaintiff-in-error, which appeared specially, traversed the return, entered a plea to

the jurisdiction, and moved to quash the return and set aside the attempted service (Rec. 656). The issues thus raised having been separately tried, the Court overruled the plea, traverse and motion to quash, with the usual leave to the plaintiff-in-error to plead to the merits (Rec. 659).

All the testimony and other proofs taken and offered on the trial of the issues raised as to jurisdiction and service, and the judgment of the Court thereon and the exceptions of the plaintiff-in-error to such judgment, are presented in a separate bill of exceptions (Rec. 665-721) duly signed by Hon. William T. Newman, United States District Judge, and filed July 21st, 1916. No objection is raised here to the fact that process was attempted to be served in Rochester, apart from our claim that the suit could not be maintained by reason of the facts presented by such bill of exceptions, which are as follows:

The plaintiff-in-error never had in the State of Georgia any office or place of business, or branch house or plant for the manufacture of products, or warehouse or storage house for the storage or display of its goods, or any property of any character or description connected with its business; nor for at least four years before the commencement of the action had it had any agent in that State (Rec. 665-6, 677-8, 693, 699). It has never registered in Georgia as a nonresident corporation for the purpose of doing business in that State (Rec. 699). The plaintiff-in-error's business with Georgia at the time of the commencement of the action was, and has always been, entirely interstate and was

conducted in the following manner: several of its travelling salesmen were assigned to a number of states, including Georgia, but not more than one of these salesmen at a time (Rec. 681) visited that State. Such visits took place about four times a year, or perhaps oftener in the larger cities, at what were evidently irregular intervals, and on such visits the salesman solicited orders from dealers. These orders were always transmitted to the home office of the plaintiff-in-error at Rochester, New York, or to its branch office in New York City, where the orders were passed upon as to their credit and were accepted or rejected (Rec. 669, 677, 681-2, 690, 700). Mr. Ames, who had been for ten years sales manager of the Eastman Kodak Company of New York and was in charge of all matters relating to its sales (Rec. 676), testified on cross-examination as follows (Rec. 681-2):

> "Q. How long have you had traveling salesmen in Georgia?
>
> A. We do not have at any time a traveling salesman in the State of Georgia continually, but Georgia is a part of the territory of the travelling salesmen.
>
> Q. Well, how often do they go into the State of Georgia, how frequently in the year?
>
> A. We have not had a salesman in Georgia for the past six months.
>
> Q. Before that time how often had they been there?
>
> A. About four trips a year. In the larger cities, perhaps more often.
>
> Q. How many salesmen would you have in Georgia at any one time?
>
> A. One."

The plaintiff-in-error also received orders by mail and filled its orders either by freight or ex-

press, sometimes from Rochester and sometimes from its branch offices at New York or Chicago. The plaintiff-in-error collected its bills for goods sold on credit from the main office at Rochester, these bills being paid by check or draft and no collectors being sent into the State of Georgia. (Ames, Rec. 677.) None of the salesmen was a resident of Georgia or maintained an office in that State (Rec. 678).

Other employees of the plaintiff-in-error known as "demonstrators" were also assigned to a number of states including Georgia, and visited that State at irregular intervals, their duty being to exhibit and explain the use of Eastman Kodak goods to consumers, chiefly professional photographers and mercantile concerns using photographic supplies (Rec. 668, 679), and to show their superiority (Rec. 668-9, 679). These demonstrators did not maintain an office in Georgia (680), nor did they solicit orders, but if, as happened occasionally, a photographer so requested, they would, purely as an accommodation to him, transmit an order from him to a dealer: but they did not call on dealers, or sell any goods or take any orders for the Eastman Kodak Company (Rec. 669-670, 683, 686-7). Only two, or possibly three, demonstrators covered the territory of which the State of Georgia was a part (Rec. 682, 684, 719).

Neither salesmen nor demonstrators had any authority to collect bills or to receive payment in money, checks, drafts or notes, (Rec. 677), or to make sales (Rec. 677, 681, 690), nor is there any evidence that they did so, nor that they had any authority to make any

contract on behalf of the Company or extend credit for it, or did either.

The Glen Photo Supply Company mentioned in the record and in the brief of defendant-in-error was merely a customer of plaintiff-in-error, which did not own any of the stock of the Georgia company, nor distribute merchandise or do any other acts through that company (Rec. 698-9).

The foregoing represents the essential evidence contained in the special bill of exceptions relating to the trial of the issues of jurisdiction and service.

> "Each bill of exceptions must be considered as presenting a distinct and substantive case; and it is on the evidence stated in itself alone that the court is to decide."
>
> *Jones* v. *Buckell*, 104 U. S. 554-56.
> *Mound Coal Co.* v. *Jeffrey Mfg. Co.*, 233 Fed. 913, C. C. A.—4th Cir. 1916.

III.—*The defense that the plaintiff was in pari delicto.*

(1) Coming now to the merits of the action, it appears that the Eastman Kodak Company is and has for many years been engaged in the manufacture of general photographic supplies, selling them wholly to retail dealers.

Prior to the commencement of this action, a suit had been brought by the United States against the plaintiff-in-error and others for alleged violations of the Anti-Trust Acts of the United States, which latter suit terminated in a decree adverse to the plaintiff-in-error (Rec. 542, 545). Down to the month of November,

1911, as to goods manufactured by it under secret processes (Rec. 260, 640), and down to the month of June, 1913, as to goods covered by its Letters Patent (Rec. 361, 644), the plaintiff-in-error (defendant below) carried on its business under a system whereby such goods were sold by it under restrictive contracts designated as "terms of sale," according to which such goods might be resold by the customer only at prices fixed by plaintiff-in-error, and the customer also agreed not to handle goods which competed with the restricted goods so sold to him (Rec. 23). In June, 1913, the plaintiff-in-error abandoned its restrictive system entirely (Rec. 361).

(2) In 1901 defendant-in-error (plaintiff below) became a regular customer of the plaintiff-in-error (defendant below), fully accepted its restrictive system (Rec. 204-5), repeatedly approved of it (Rec. 204-5, 228-9), contracted to maintain it (Rec. 211), and when called to account for sundry violations of the terms of sale, apologized, promised future compliance, reaffirmed its intention to comply with the terms of sale in all respects (Rec. 230, 231), and reported violations by other dealers (Rec. 215-18, 223-4), thus voluntarily becoming and continuing for over eight years *in pari delicto* with the plaintiff-in-error.

(3) To state in more detail the extent of the participation of defendant-in-error in the system pronounced illegal, the following facts appear: On September 17th, 1901, the plaintiff-in-error wrote to the defendant-in-error (Rec. 203-

4) acknowledging receipt of an order from the jobber and enclosing a copy of the then current terms of sale and various other circulars stating the terms and conditions under which the plaintiff-in-error sold its goods. The terms of sale thus enclosed were those effective May 1st, 1901, printed at pages 591-4 of the record.

(a) The conditions of these terms of sale were well understood by the defendant-in-error from the beginning, for on October 4th, 1901, (Rec. 204-5) it wrote to the plaintiff-in-error:

> "We have before us your valued favor of the 2nd inst. and replying will state that the *terms and discounts are satisfactory and fully understood.*"

And again on October 24th, 1902 (Rec. 211):

> "As you are well aware of the fact that *we are under contract with you to sell your goods, and yours only.*"

And again on November 22nd, 1902 (Rec. 215):

> "Is it right, according to *our restricted contract with you,* that these people receive the dealers' discount?"

Also, to the same effect, on March 17th, 1903, (Rec. 217), April 9th, 1903, (Rec. 220), November 20th, 1903, (Rec. 223), and December 11th, 1903 (Rec. 224).

(b) On several occasions when the defendant-in-error had been called to account for some slight violation of the terms of sale, it ex-

pressed contrition and gave assurance of reform (Rec. 226, 230).

(c) On October 19th, 1909, referring to the purchase by the plaintiff-in-error of the popular Artura paper, theretofore owned and marketed by a competing concern, the defendant-in-error wrote heartily approving of the purchase (Rec. 231).

(d) On numerous occasions defendant-in-error reported to plaintiff-in-error violations by other dealers of the defendant's terms of sale, or injurious acts by those not customers of the defendant and claiming to be such, all of these instances involving espionage. Thus in September, 1902 (Rec. 205-6), November 22nd, 1902 (Rec. 215), February 21st, 1903 (Rec. 216), March 17th, 1903 (Rec. 217-18), November 20th, 1903 (Rec. 223), December 11th, 1903 (Rec. 224), December 18th, 1905 (Rec. 227), and November 22nd, 1909 (Rec. 232-233). Goodhart, the secretary and treasurer of the plaintiff, (Rec. 148) testified (Rec. 250) under cross-examination:

> "Q. You wrote all these letters? Where you would catch a fellow violating the terms of sale, you would notify Eastman Kodak Company at once?
>
> A. Yes. We wanted to sell all the goods we could. We were looking out for the Southern Photo Material Company and we wanted to get what business we could and sell all the goods we could."

(e) Throughout a large part of the period of its relations with the plaintiff-in-error, and in order to obtain a special credit equal to a 12% discount, defendant-in-error by its authorized officers (Rec. 235) signed what were known as

"credit memorandums," of which approximately one hundred and sixty are in evidence dating from October 20th, 1901, to November 20th, 1907, (Rec. 602-629), from the Eastman Kodak Company itself and its subsidiaries, each of which certified in substance that the defendant-in-error during the four preceding months had sold only goods purchased from plaintiff-in-error and at the prices prescribed by the terms of sale, with permitted exceptions. The various credits received by the defendant-in-error upon signing these so-called credit memorandums aggregated, in the case of those set out in the record, not less than $10,767.31 (Rec. 235). Credit memorandums were not used by plaintiff-in-error after January 1st, 1908 (Rec. 235).

(f) Copies of the various terms of sale issued from time to time by the plaintiff-in-error are printed in the record at pages 571-594, 597-600 and 640-651. Of all of these, defendant-in-error was fully informed and approved of the same, and from time to time agreed to conform to them (Rec. 205, 219, 226, 230). Thus, on April 6th, 1903 (Rec. 219), defendant-in-error wrote:

> "We are in receipt of your valued favor of the 4th inst. authorizing the sale of Kresco paper. *We will only sell this paper where necessary to kill non-trust products.*"

Mr. Goodhart, treasurer of the plaintiff, on cross-examination testified (Rec. 250):

> "Q. You knew what the terms (of sale) were?
>
> A. Oh, yes, we knew what the terms (of sale) were."

IV.—*The Ansco Contract.*

In March, 1910, the defendant-in-error entered into an exclusive agreement with the so-called Ansco Company, one of the principal competitors of plaintiff-in-error, (Rec. 241-5), by the terms of which agreement defendant-in-error *undertook not to sell any but Ansco goods at wholesale, and not to push other than Ansco goods at retail, and to prefer Ansco goods at all times and in all ways over all other goods.* Shortly thereafter plaintiff-in-error declined to sell the defendant-in-error any further, except at full retail prices (Rec. 165-169).

Entering upon the performance of its Ansco contract (Rec. 241-245), defendant-in-error placed a large initial order with the Ansco Company (Rec. 246), and between April 1st, 1910, and April 1st, 1911, bought Ansco goods to the amount of $50,437.26 (Rec. 246). Its largest purchase of Eastman goods ever made in one year had been $26,364.87 in 1908 (Rec. 236). Thereafter its purchase of Ansco goods increased rapidly up to $104,108.89 (Rec. 246), in the fiscal year 1915-16.

V.—*Basis of alleged cause of action.*

The alleged cause of action is based upon the claim of defendant-in-error that it is entitled to recover for damages claimed to have been sustained in its business by being prevented from purchasing the goods of plaintiff-in-error at dealers' discounts, such damages to cover the period from April 5th, 1910, to the beginning of

the action, about February 16th, 1915. Under the ruling of the trial court, damages were allowed on the basis of the *net* profits which the defendant-in-error estimated it would have made if allowed to continue the sale of Eastman goods; using, however, as the sole basis for such estimate, the actual *gross* profits claimed by the defendant-in-error for the period prior to April 5, 1910, during which period the defendant-in-error was *in pari delicto* with the plaintiff-in-error.

VI.—*Insufficiency of proof of damage.*

(1) The only evidence offered to sustain defendant-in-error's claims for damages is the following:

(a) Evidence as to rates of gross discounts allowed to the defendant-in-error (plaintiff below) by the plaintiff-in-error (defendant below) on individual items of merchandise; as to the amounts of the gross sales of some of these made by defendant-in-error while still a customer of plaintiff-in-error; and as to the expenses not of the sale of such items but of the entire business of defendant-in-error; which evidence was clearly inadmissible to prove damages not only because the defendant-in-error was *in pari delicto,* but because such evidence did not show the separate cost of handling Eastman goods (which formed only a small part of the total sales of defendant-in-error), nor of any item of them, nor the net profit on such goods made by defendant-in-error.

(b) The purely speculative testimony of plaintiff's treasurer, Goodhart, that plaintiff (defendant-in-error) could have continued to sell the Eastman line, in spite of its handling of the Ansco line (Rec. 261), and that dealers wishing Eastman goods would order all their goods from other concerns which handled the Eastman line (Rec. 302), which last testimony obviously must have been hearsay (Rec. 303); and also Goodhart's testimony several times repeated that the defendant-in-error, after it had taken on the Ansco line, could have handled Eastman goods at no more than 5 per cent. additional cost (Rec. 191-92). Defendant-in-error did not, in fact, sell Eastman goods after April, 1910, and Goodhart could only guess how much of them he would have sold. The 5 per cent. estimate of increased cost is purely a guess and is negatived by the testimony of Mr. Haight (Rec. 379), who said:

> "Q. Now, with reference to Artura and Azo paper, in 1910, after the Southern Photo Material Company had taken over the sale of the Ansco product, will you tell us from your knowledge of the photo stock business whether it was possible for that company to sell Artura and Azo paper at a selling cost of only five per cent?
>
> A. It was not.
>
> Q. Why?
>
> A. Why, the cost of handling it exceeded that materially. The investment in the stock, the deterioration in the stock that would have to be returned, and the general cost of handling it would far exceed five per cent.
>
> Q. Is there any way of determining what the additional cost would have been over and above the rest of the business that they were

doing, of selling the additional amount of Artura and Azo paper?

A. I don't think it could be accurately determined."

Mr. Haight had, for eleven years, been in charge of a large Eastman stock house in Boston, with an annual volume of business varying from $252,000 to $360,000 a year, and had had an immense experience in all branches of the business of selling photographic goods (Rec. 347). He further testified (Rec. 389) that in his experience the ratio of the cost of selling to the amount of sales remained constant. In other words, the expenses increased as the total sales increased.

Of course, the losses of defendant-in-error, if such there were, arising from its inability to sell photographic goods other than those of Eastman manufacture, because, as claimed, customers wished to buy a complete line from a single dealer, are too remote and furnish no basis for a recovery; also defendant-in-error could have bought Eastman goods at list prices and thus have limited its loss, since these goods would on its own theory have then enabled defendant-in-error to sell its other lines.

Frey & Son v. *Welch Grape Juice Co.*,
240 Fed. 114, p. 117, at bottom.

(2) Much of the evidence of the defendant-in-error flatly contradicts its own claim as to damages.

(a) The total business done by defendant-in-error (while still an Eastman customer) deducting costs and expenses from total sales, showed a net loss in 1908 of $893.73, and in 1909, a net

loss of $2,452.70. (Rec. 235-6, 302, and table page 21). On the other hand, in 1910, its first year of handling the Ansco goods, the defendant-in-error made a clear net profit of $2,932.64 (Rec. 239), and in 1911, a profit stated (Rec. 313), as $6,380, but which on comparison with the other figures, appears to have been slightly below $6,000 (Rec. 237, 313). A table is appended (page 21), in which the various figures of the purchases, sales, costs, expenses, net gains and losses, of defendant-in-error, so far as given in the testimony, are arranged.

(b) The claims made by defendant-in-error to a constantly increasing volume of sales of Eastman goods while it remained an Eastman customer, and to a probable progressive increase in similar sales subsequent to that period, had it continued to handle Eastman goods, are shown to be without foundation by the figures given by Goodhart. (See table, page 21). From these it appears that the *purchases* of Eastman goods made by defendant-in-error in 1908, were $26,364.87 (Rec. 236), and in 1909 only $20,993.27 (Rec. 237) and that its *sales* of Eastman goods ran as follows (Rec. 212):

1906	$34,494.97
1907	35,208.48
1908	29,196.06
1909	32,258.04

So far as these figures prove anything, they show that the business of defendant-in-error in Eastman goods was on the decrease before the interruption. This, indeed, is practically ad-

mitted. On the other hand, defendant-in-error jumped immediately into a much larger, and, as shown above, a more profitable business, by taking over the Ansco line. Thus, its purchases of Ansco goods for the years beginning 1910 were as follows (Rec. 246):

1910	$ 50,437.26
1911	51,565.36
1912	76,412.47
1913	88,876.18
1914	74,940.16
1915	104,108.89

(c) There is not a word of testimony to show that defendant-in-error sustained any damage through the acquisition by the Eastman Company of various concerns which had theretofore made photographic paper or other goods. On the contrary, Eastman dealers gained largely by the advertising done by the Eastman Company and by the greater vogue which it gave to the acquired products. Thus Goodhart (Rec. 322-3):

> "Q. But did you sell more of them (acquired products) by reason of the fact that you were in the Eastman combination?
>
> A. *Like Artura,* when we got that, *we sold worlds of it,* but we didn't have it prior to 1910.
>
> Q. When Eastman would buy these things, and take them into their line, did that hurt your business, or help it, or leave it the same?
>
> A. They advertised it extensively and created a demand for the goods."

Moreover, as shown elsewhere in this brief (p. 58), and as expressly conceded by the de-

fendant-in-error (Rec. 322), *all the products of the companies purchased were immediately incorporated into the Terms of Sale,* and were accepted by the defendant-in-error, as were other Eastman products, with an oft-ratified agreement to sell them under the conditions laid down in the terms of sale. Nor did the acquisition of other lines by Eastman change the system under which these had previously been sold. Goodhart (treasurer of defendant-in-error) says (Rec. 323):

> "A. *Every other manufacturer had restricted prices, also Folmer & Schwing, and others, prior to the time that Eastman took them over. It was the policy of practically all manufacturers to help the dealers to make as much money as possible.*
>
> Q. Trying to uphold your profits?
>
> A. Every manufacturer tries to do that."

ar	Purchases E. K. Goods		Sales E. K. Goods (Rec. 212)		Purchases Ansco Goods Apr. 1-Apr. 1		Total Cost All Goods Sold		Total Sales		Total Expenses		Apparent Net Loss or Gain	
16			34,494.97	*(212)					90,404.65	*(313)	26,680.00	*(289)		
17			35,208.48	(212)			73,741.90	*(289)	105,205.13	(289)				
18	26,364.87	*(236)	29,196.06	(212)			68,269.90	(236)	101,682.47	(235-6)	34,306.30	(236)	— 893.73	(loss)
19	20,993.27	(237)	32,258.04	(212)			59,044.33	(236)	91,876.00	(236)	35,284.37	(302)	— 2,452.70	(loss)
20	8,835.52	(265)	13,367.91	(212)	50,437.26	*(246)	87,089.99	(237)	119,339.44	(237)	36,240.75	(237)	2,932.64	*(239)
21					51,565.36	(246)	95,465.11	(237)	141,074.72	(237)	39,762.88	(313)	5,846.73	(237, 313)
22					76,412.47	(246)			149,432.94	(300)	50,000.00	(313)		
23					88,876.18	(246)			164,293.84	(300)				
24					74,940.16	(246)			162,268.06	(300)	35,452.45	(302)		
25					104,108.89	(246)			184,000.00	(317)				

ferences in parenthesis are to pages of Record.

Specification of Errors.

See the amended Assignment of Errors (Rec. 742-748).

It is respectfully submitted that the Circuit Court of Appeals erred in the following, among other, particulars:

(1) In affirming and not reversing the judgment of the District Court for the sum of $23,743.98 and $5,000 attorney's fees entered on September 30th, 1922, in favor of the defendant-in-error and against the plaintiff-in-error, and in not remanding said cause to the District Court for a new trial or for a dismissal for lack of jurisdiction. (See Assignment of Errors Nos. 1 and 2, Rec. 742).

(2) In not reversing said judgment because of the error of the District Court in refusing to quash the service of process and the pleas to the jurisdiction based thereon filed by plaintiff-in-error in said cause and to dismiss the cause for the reason that the District Court had no jurisdiction in the premises, because the evidence shows that the plaintiff-in-error did not reside in and was not an inhabitant of the Northern District of Georgia; was not found therein; had no agent therein subject to legal service of process; and did not transact business within said District of the character necessary to subject the plaintiff-in-error to the service of process upon it. (See Assignment of Errors No. 3, Rec. 742; Separate Bill of Exceptions Rec. 676-692).

(3) In refusing to reverse the judgment of the District Court for its error in overruling the objections to and admitting in evidence the testimony of the witness E. H. Goodhart as to gross sales of Eastman goods claimed to have been made, and as to gross discounts thereon claimed to have been received, by defendant-in-error prior to April 5, 1910, and also the testimony of said witness to the effect that the additional cost to the defendant-in-error of handling Eastman goods after April, 1910, would have been 5% of the selling price of such goods, because

(a) The business of defendant-in-error (plaintiff below) was conducted as a single unit with respect to expenses and there was no segregation of, and no way of ascertaining, the separate expenses of handling Eastman goods, which were only a part of the entire business of the defendant-in-error;

(b) Because the assumption that defendant-in-error could have sold the same quantity of Eastman goods after as before April, 1910, disregards the changed conditions due to the taking on by defendant-in-error of the Ansco line;

(c) Because such testimony of the witness Goodhart was purely speculative and guess work and not founded on any experience or knowledge derived from experience.

(d) Because defendant-in-error, by conforming to the terms of sale, became *in pari delicto* with plaintiff-in-error, so that the business of

defendant-in-error in Eastman goods before April, 1910, may not be used as a standard by which to measure profits alleged to have been lost by defendant-in-error after that date;

(See Assignment of Errors No. 4, Rec. 743; Bill of Exceptions Rec. 108-111).

(4) In refusing to reverse the judgment of the District Court for its error in admitting over objections the testimony of the witness Goodhart to the effect that the inability of the defendant-in-error to supply Artura paper after April, 1910, caused its customers to order also other materials elsewhere and thus decreased the sales of defendant-in-error (because this was an argumentative conclusion based on what was admittedly hearsay). (See Assignment of Errors No. 5, Rec. 744; Bill of Exceptions 111-114).

(5) In not reversing the said judgment on the ground that the District Court erred in denying the motion of the plaintiff-in-error to have a verdict directed in its favor, because

(a) Prospective profits are too remote and speculative unless capable of ascertainment by comparison with previous results of an established business. From September, 1901 to April 4th, 1910, defendant-in-error was an Eastman dealer and participated in all the advantages of the business system of plaintiff-in-error, approved of the same and assisted in enforcing it; and if such system was unlawful, defendant-in-error, even if it could not secure the goods of plaintiff-in-error without complying with the latter's terms of sale and conforming to its said system, was

in pari delicto with the plaintiff-in-error; hence, the profits of defendant-in-error made in such business cannot be used as a standard from which to determine the prospective profits of defendant-in-error after April 4th, 1910, and there was, therefore, no rule by which such profits could be measured.

(b) The business of defendant-in-error as a whole was more profitable after April 4th, 1910, than it had been previously, and, therefore, if the results of such business before such date are to be used as a standard of comparison with subsequent business, the proof shows no damage suffered by defendant-in-error.

(c) The act of defendant-in-error in taking on the Ansco products under a preferential contract justified plaintiff-in-error in its refusal longer to sell its products to the defendant-in-error.

(d) In the absence of proof that plaintiff-in-error had been conducting its business unlawfully, it had a right to refuse to sell its goods to defendant-in-error with or without reason.

(e) The evidence failed to show any damages sustained by defendant-in-error as a result of acts of plaintiff-in-error, because, the expenses of the business of defendant-in-error, prior and subsequent to April 4th, 1910, having been pooled into one expense account, no legal basis was proven for a reasonably correct estimate of the amount of actual net profits, if any, made or which might have been made by defendant-in-

error on the Eastman goods sold by it. (See Assignment of Errors No. 6, Rec. 744; Bill of Exceptions, Rec. 121-125.)

(6) In not holding as a matter of law that the defendant-in-error for the reasons given above was *in pari delicto* with the plaintiff-in-error and that, as a result of such relations, the experience of defendant-in-error in such business could form no basis of calculation of any loss of profits claimed to have been sustained by the defendant-in-error as a result of the termination of such relations. (See Assignment of Errors No. 7, Rec. 745; Bill of Exceptions, Rec. 135, 139, 142-4).

(7) In refusing to reverse the said judgment because of the error of the District Court in refusing and failing to charge the jury as requested by the plaintiff-in-error, and in erroneously charging the jury, as follows:

In refusing to charge as follows:

(a) The defendant-in-error could not segregate its business transactions and divide them up into particular commodities and undertake to prove that profits were made on such special commodities separate and distinct from the volume of the general business of defendant-in-error, inasmuch as the business of defendant-in-error was conducted with no separation in the departments and no apportionment of the expenses of handling the different commodities, so that any effort to separate the profits or losses of the defendant-in-error as to any particular

commodity would involve too much speculation to form a basis of a lawful verdict and judgment in the case. (See Assignment of Errors No. 8, Rec. 745; Bill of Exceptions, Rec. 131-2.)

(b) Gross profits either on the business as a whole or upon any particular commodity or class of commodities bought and sold in connection with said business, are not recoverable in this case and cannot be used by you as a criterion by which to measure damages unless the evidence accompanying such proof of gross profits is sufficient to enable you with reasonable certainty to arrive at the net profits for any given period of time under investigation. (See Assignment of Errors No. 8, Rec. 745, at p. 746; Bill of Exceptions, Rec. 132).

This refusal was error because there was no proof of net profits except the mere estimate of the witness.

(c) The mere fact that the plaintiff had an urgent need for the defendant's goods, in order to keep up his stock and continue in trade, and that it was a business necessity for the plaintiff to conform to the defendant's system and to carry out the provisions of the terms of sale because the plaintiff feared that disastrous results to his business would follow if he did otherwise—if the jury find that to have been the fact—did not excuse the plaintiff for joining in an unlawful combination. If, therefore, the jury find that the defendant's sale system violated the Anti-Trust Acts and that the plaintiff conformed and acquiesced in the same and carried on his business in accordance with the terms of

sale—even though to do so was such a business necessity, then any profits which the evidence may show the plaintiff realized from the business thus transacted with the defendant, must be disregarded by you in this case. (See Assignment of Errors No. 8, Rec. 745, at p. 746; Bill of Exceptions, Rec. 134.)

In charging the jury as follows:

(d) On the other hand, if he (the plaintiff) did nothing more than deal with the trust by the use of its goods on the terms that were prescribed to him, not in a desire to help towards the building up of the monopoly or seeking benefit from it, but because he needed the goods and that was the only way he could get them, then he bears to that extent, the relation of buyer, and would not be, to that extent, *in pari delicto,* and could complain if after ceasing his dealing with the trust he was hurt, and suffered financial loss. (See Assignment of Errors No. 8, Rec. 745, at p. 747; Bill of Exceptions, Rec. 144-5.)

In refusing to give the following or substantially identical instructions:

(e) If the jury should find that the defendant's system of doing business, as set forth in its terms of sale and as carried out in accordance therewith, was a violation of the provisions of the Anti-Trust Acts, and if they should further find that the plaintiff not only conformed to the said system and complied with its requirements under the terms of sale, but assisted actively in enforcing the same against other dealers, by giving information as to violations by such dealers of the terms of sale, and voluntarily assisted defendant

to secure evidence of such violations, then I charge you that you must find that the plaintiff became a party to such unlawful system and a violator of the provisions of the Anti-Trust Acts, in common with the defendant, and any profits made by him, while such a member of such combination or conspiracy, if you believe any such profits were made, cannot be used in any manner by you in arriving at any alleged loss of profits claimed by the plaintiff in this case. (See Assignment of Errors No. 8, Rec. 745, at p. 747; Bill of Exceptions, Rec. 136).

(f) The defendant is not obliged to place its goods in such a position that they will be discredited in comparison with the goods manufactured by its competitors nor is defendant compelled to place its products in the hands of a dealer who has a contract to give preference to sales of similar products of competing manufacturers over the products of the defendant. The refusal of the defendant to sell its goods to the plaintiff to be thus placed in this disadvantageous position in competition with similar products marketed by competing manufacturers would not be an actionable wrong against the plaintiff, notwithstanding the defendant had been adjudicated to have violated the Anti-Trust Act in the particulars set forth in the evidence. (See Assignment of Errors No. 8, Rec. 745, at p. 748; Bill of Exceptions, Rec. 140-1).

BRIEF OF ARGUMENT.

POINT I.

The plaintiff-in-error, Eastman Kodak Company of New York, at the time of the commencement of the suit and for a long time prior thereto, did not reside in and was not found in the State of Georgia, nor had it an agent in, nor was it transacting business in, that State. Hence, the attempted service of process upon the plaintiff-in-error, whether in the State of Georgia or in the State of New York, was void and the Court below had no jurisdiction in the premises.

1. The plaintiff-in-error is a New York corporation, and any claim that it was "found" in the State of Georgia or had an agent there has practically been abandoned. The facts under this point are stated above at pages 5-9, and upon them we submit that the plaintiff-in-error was not transacting business in the said state in such a way as would subject it to service of process in a suit brought in a Federal district within that state.

> *People's Tobacco Company, Ltd.* v. *American Tobacco Company,* 246 U. S. 79.

That case was brought under the Sherman Act in which the words "transacts business" do not occur, but presumably this Court would not have decided otherwise had the Clayton Act been in force when the suit was begun, for Mr. Justice Day expressly stated that the words "resides or is found" as used in the Sherman Act were the equivalent of "car-

rying on (i.e., transacting) business" in the district (p. 84). Holding that the Court had no jurisdiction over the defendant, Mr. Justice Day says, at pp. 85-6:

> "It is true, as found by the District Court, that at the time of the service, and thereafter, the American Tobacco Company was selling goods in Louisiana to jobbers, and *sending its drummers into that State to solicit orders of the retail trade, to be turned over to the jobbers,* the charges being made by the jobbers to the retailers. It further appears that these agents were not domiciled in the State, and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it."

The facts thus stated are practically identical with those in the instant case. Here it appears that plaintiff-in-error sent demonstrators, to visit photographers in Georgia and explain Eastman goods to them (Rec. 679, 684, 686-7); and also travelling salesmen who merely solicited orders (Rec. 669, 677, 681-2, 690, 700). Neither salesmen nor demonstrators had any authority to collect bills nor any authority to, nor did they, receive payment in money, checks, drafts, notes or otherwise, or make sales (Rec. 677, 681, 690). In the *People's Tobacco Co.* case (supra), Mr. Justice Day said at p. 87, as to such employes:

> "As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that State, as above detailed, *the agents having no authority beyond solicitation,* we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the

> corporation to the local jurisdiction for the purpose of service of process upon it. *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S., 264, 268."

And at p. 87, he said further, in distinguishing *International Harvester Co.* v. *Kentucky*, 234 U. S. 579:

> "In that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State."

It is clear, therefore, that plaintiff-in-error was not transacting business in Georgia in the required sense.

The rule that the mere solicitation of orders is not enough to constitute that doing or transacting of business which subjects a foreign corporation to local jurisdiction for the purpose of service of process upon it, has been reiterated in later decisions of this Court.

> *Minnesota Commercial Men's Association* v. *Benn*, 261 U. S. 140.
>
> *Davis, Director General of Railroads, as Agent, etc.*, v. *Farmers' Co-operative Equity Company*, 262 U. S. 312.

2. Also, other Courts of high standing, including those of the State of Georgia, following the decision of this Court in *People's Tobacco Co.* v. *American Tobacco Co., supra,* have accepted the same doctrine.

> *Vicksburg, Shreveport, & Pacific Ry.* v *De Bow,* 148 Ga. 738, 744-45.
>
> *Southeastern Distributing Co.* v. *Nordyke & Marmon Co.,* 125 S. E. 171, Sup. Ct. of Ga., decided October, 1924.
>
> *Chase Bag Co.* v. *Munson Steamship Line,* 295 Fed. 990, 994, Court of Appeals, Dist. of Columbia, decided February, 1924.
>
> *Holzer* v. *Dodge Brothers,* 233 N. Y. Court of Appeals 216, 222.

In *Southeastern Distributing Co.* v. *Nordyke & Marmon Co., supra,* the Supreme Court of Georgia refused to follow the decision of the Circuit Court of Appeals in the instant case, and in the case before it held (citing *People's Tobacco Co.* v. *American Tobacco Co., supra*) that the defendant in that case was not doing business in the State in the required sense, although the defendant, a foreign corporation, which sold its goods to a Georgia corporation for distribution, had a district representative in Georgia whose duties were as follows (p. 176):

> "He does not sell any cars for the defendant. He visits distributors and dealers from time to time within this territory. He assists them in every way possible in selling

their cars purchased from the defendant. He demonstrates to the prospective buyer from such distributors or dealers their Marmon cars. He instructs such distributors and dealers in the art of salesmanship of Marmon cars. He will sell (meaning to take orders for) such cars belonging to demonstrators or dealers and turns over the orders therefor to such demonstrators or dealers and keeps up with the business done by demonstrators and dealers and makes reports thereon to the defendant at its home office. He sees that distributors and dealers render proper service to the users of Marmon cars purchased from them in order that such users may be satisfied with their cars."

The facts in this Georgia case were much stronger than any which could possibly be pieced out in the instant case.

3. The case of *Northwestern Consolidated Milling Co.* v. *Massachusetts*, 246 U. S. 147, 155, usually cited as *Cheney* v. *Massachusetts* (which was decided on the same day as *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79) is clearly distinguishable from the case at bar. It appears from the report of that case in the Massachusetts Court (218 Mass. 558, 575) that:

> *"The major part of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers."*

In the case at bar, no orders were solicited by the demonstrators of the plaintiff-in-error (Rec. 683) though, as an accommodation to photogra-

phers (Rec. 687), they sometimes received orders to be turned over to the dealer. The number of such orders was nominal (Rec. 683).

4. The basis of jurisdiction is not in the least strengthened by adopting the machinery provided by the Clayton Act (Section 12) for service of process at the home office of the Company. Where service is so made, jurisdiction must rest upon two elements: (1) "transaction of business" by the defendant within the territorial limits of the Court, and (2) appropriate service upon an authorized agent of the defendant in the district of which the defendant is an inhabitant or where it is found (Clayton Act. Sec. 12). The absence of either element defeats the jurisdiction of the Court.

5. That Congress, by inserting in Section 12 of the Clayton Act after the words "may be found" the additional words "or transacts business," did not intend to broaden the section but merely to make explicit what this Court had already decided, is shown by the legislative proceedings, (*Duplex Co.* v. *Deering,* 254 U. S. 443, 474-5), a summary of which proceedings is appended hereto as "Appendix I," and by the following citations: We have already noted the language of this Court in the *People's Tobacco* case, defining the words "resides or is found" as the equivalent of "carrying on business," (246 U. S. 84), but in an earlier case, *St. Louis Southwestern Railway Co. of Texas* v. *Alexander,* 227 U. S. 218, decided February 3rd, 1913, more than a year before Mr. Clayton introduced his bill into the House, Mr. Justice Day, at p. 226, said:

> "A long line of decisions in this Court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is *transacting business* in that district to such an extent as to subject it to the jurisdiction and laws thereof."

Citing numerous cases.

6. *Frey and Son, Inc.* v. *Cudahy Packing Co.*, 228 Fed. 209, and the decision of Newman, J., in the instant case (234 Fed. 955), were both rendered long before the decision of this Court in *People's Tobacco Co.* v. *American Tobacco Co., supra.* Moreover in the *Frey* case it was shown that the defendant carried in a warehouse in the state in question a permanent stock of goods of a value as high as $10,000, which goods, upon orders from the defendant, the warehouse company would deliver to those to whom the defendant had sold the same (228 Fed. 212). Also, other facts appeared, tending to show that the defendant was doing business in the state within the authorities. The case of *General Investment Co.* v. *Lakeshore & M. S. R. Co.*, 260 U. S. 261, does not help the plaintiff-in-error. The comparison which the Court makes in that case is between Section 51 of the Judicial Code and Section 12 of the Clayton Act (p. 279), and not at all between any language in the Sherman Act and that in the Clayton Act. This case of *General Investment Company* v. *Lakeshore & M. S. Ry Co.*, is in fact an authority for the plaintiff-in-error, since in that case it was held that the New York Central Railroad Co. transacted no business in Ohio, although tickets over its road

were sold at a ticket office in Cleveland by an agent of the Lake Shore Company. Mr. Justice Van Devanter closed the discussion, p. 268 of that case, by saying:

> "It follows that the purported service on this company was invalid and rightly set aside. *Philadelphia & R. R. Co.* v. *McKibbin*, 243 U. S. 264. and cases cited."

Philadelphia & R. R. Co. v. *McKibbin*, though brought before the passage of the Clayton Act, is thus cited as of continued authority on the question of jurisdiction, notwithstanding the fact that the *General Investment Company* case was distinctly brought under the Clayton Act. Much more must the *People's Tobacco Co.* case be regarded as still an authority.

This point is raised by specifications of error Nos. 1 and 2 (*supra*, p. 22).

POINT II.

The defendant-in-error, while a customer of the plaintiff-in-error, was a participant in the latter's unlawful acts and was, therefore, in pari delicto, and the profits earned by defendant-in-error during the period of such illegality cannot be used as a standard by which to measure the damages which it alleges it sustained in the period for which it was allowed to recover. There is, therefore, no competent proof of damages in the record.

First: The defendant-in-error throughout the period during which it was an Eastman customer was an active and voluntary participant in the alleged combination, conspiracy and other unlawful acts which the plaintiff-in-error was

charged with conducting and committing. It expressed its approval of the Eastman system, acquiesced in and complied with it; repeatedly agreed in writing to maintain it; did all that it could to promote the system by calling attention to alleged violations of the Terms of Sale, and practiced espionage upon its competitors for the purpose of securing evidence of such violations. It enjoyed all the advantages which flowed from the restrictions imposed by the Terms of Sale upon its competitors, and as a reward for its participation in the illegal system, received refunds amounting to no less than $10,767.31 (Rec. 235). The defendant-in-error must, therefore, be considered to have agreed to and to have acquiesced in and ratified the illegal system, and thereby to have become a party to the wrongdoing and itself to have violated the Anti-Trust Acts (Statement of the case, pp. 10-14).

1. The test to be applied as to the legal position of defendant-in-error, while a customer of the plaintiff-in-error under its terms of sale, is this: Would the Court have then given relief to either party to the illegal contract for injuries caused by the other party and growing out of the contract relation? The answer must be in the negative.

McMullen v. *Hoffman*, 174 U. S. 639, 654, 669.
Coppell v. *Hall*, 7 Wallace, 542, 558.
Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262.

Harriman v. *Northern Securities Co.*, 197 U. S., 244, 295-6.
Hall v. *Corcoran*, 107 Mass. 251, 253.

In *Coppell* v. *Hall*, 7 Wallace, 542, at pp. 558-559, Mr. Justice Swayne, referring to the parties to an illegal contract, said:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. • • • Where the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

In *McMullen* v. *Hoffman*, 174 U. S. 639, at p. 669, Mr. Justice Peckham says of an illegal contract:

> "The Court refuses to enforce such a contract and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest."

In *Hall* v. *Corcoran*, 107 Mass. 251, 253, the rule is tersely stated by Gray, *J.*, afterwards Mr. Justice Gray of this Court:

> "The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part."

In *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, plaintiff, which was an illegal combination, in an action at law sought to recover from the defendant for the value of goods delivered to the defendant in pursuance of the illegal agreements on which the combination was based. At p. 262, Mr. Justice Harlan says:

> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties."

2. Mere participation and acquiescence by the defendant-in-error in the unlawful system of plaintiff-in-error made the former a party to the wrongdoing and itself a violator of the Sherman Act.

Sage v. *Hampe*, 235 U. S. 99, 105.
Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 816-17; C. C. A., 3rd Cir., Mar. 1921.
Eastman Kodak Co. v. *Blackmore*, 277 Fed., 694; C. C. A., 2nd Cir., Dec. 1921.
Tilden v. *Quaker Oats Co.*, 1 F. (2d), No. 2, 160, 166, Advance Sheets, Nov. 20, 1924, C. C. A. 7th Cir. decided July, 1924.
Bluefields S. S. Co. v. *United Fruit Co.*, 243 Fed. 1, 13, 18, C. C. A., 3rd Cir., June, 1917.

In *Sage* v. *Hampe*, 235 U. S. 99, at p. 105, Mr. Justice Holmes said:

> "A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for non-performance than it creates an equity to compel the contractor to perform. *A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. Kalem Co.* v. *Harper Brothers*, 222 U. S. 55, 63."

In *Victor Talking Machine Co.* v. *Kemeny*, 271 Fed. 810, C. C. A. 3rd Cir., Mar. 1921, the plaintiff Kemeny, who had been a customer of the defendant Victor Talking Machine Company, under an illegal price maintenance system, had been dropped by the defendant and had sued for damages. It was contended by the defendant that the damages grew out of the illegal con-

tract, and that the plaintiff, having been a part of the system or combination and thereby having participated in a violation of the law, could not be heard to complain of injury to his business resulting therefrom. The Court, by Woolley, *C. J.*, at pp. 816-17, said:

> "If we were to find as the defendant assumes that the cause of action is based on conduct involved under the contract of license with the plaintiff, concluding with its cancellation, we should not hesitate to hold that the plaintiff was as guilty as the defendant in violating the law, and that the principle on which *Bluefields Steamship Co., Limited* v. *United Fruit Co.*, 243 Fed. 1, was decided would apply to him and preclude recovery. *In pari delicto potior est conditio defendentis.*"

In *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694, 2nd Cir., the plaintiff Blackmore, who had been a customer of the defendant, Eastman Kodak Company, *under the very system and terms of sale involved in the instant case*, had sued that Company for damages resulting from its refusal to sell him goods after a certain date. The facts were almost identical with those in the instant case. Participation in the alleged wrongful system was proved by the same class of evidence as that which the present record discloses. (277 Fed. 696). Commenting on these facts, Mayer, *C. J.*, says at pp. 697-8:

> "From the foregoing outline it is apparent that during the period of 1908 to June, 1913, plaintiff acquiesced and actively participated in defendant's so-called restrictive sales system. * * *

> "During this period he gained such advantages as accrued from the price-fixing system, and from the exclusion of those dealers who, unlike plaintiff, would not accede to this method of doing business * * *."

Then after quoting from *Hall* v. *Corcoran,* 107 Mass. 251, 253, *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227, *Bluefields S. S. Co.* v. *United Fruit Co.,* 243 Fed. 1, and other cases cited above, Judge Mayer concludes at p. 699 as follows:

> "The proposition of plaintiff, in effect, is that, while he joined with defendant in the illegal method of doing business after 1908 and took such advantages as sprang therefrom, he may nevertheless recover damages caused, as he claims, during the period when he and defendant were wrongdoers. With this proposition we are unable to agree."

In *Tilden* v. *Quaker Oats Co.,* 1 Fed. (second series), Adv. Sheets No. 2, 160, C. C. A., 7th Cir., July, 1924 (which arose under Section 7 of the Sherman Act) at p. 166, the Court said:

> "The fact of entering into the contract, if it was unlawful and produced damage, is shown by the complaint to have been a voluntary wrongful participating act of the corporation Cereal Company, and being such, bars recovery."

Citing among other authorities, *Eastman Kodak Co.* v. *Blackmore,* 277 Fed. 694, 698, 699 (C. C. A. 2d Cir.); *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed. 810, 816 (C. C. A. 3rd Cir.); *Bluefields*

S. S. Co. v. *United Fruit Co.*, 243 Fed. 1, 18 (C. C. A. 3d Cir.).

3. The assumed fact that defendant-in-error accepted the terms of sale and joined with plaintiff-in-error in maintaining the latter's illegal system because, as stated by the learned Trial Judge in his charge: "*he needed the goods and that was the only way he could get them,*" (Rec. 144) did not excuse the defendant-in-error nor relieve it of the penalties of one who is *in pari delicto*. Its necessity, if such there was, did not constitute legal duress.

In *Eastman Kodak Co.* v. *Blackmore*, 277 Fed. 694 at p. 699, under precisely similar circumstances and in reference to the same terms of sale, the Circuit Court of Appeals in the Second Circuit held that "*there was no evidence of coercion in its legal acceptation.*"

In *Dennehy* v. *McNulta*, 86 Fed. 825, C. C. A. 7th Cir. (1898), the plaintiff sought to recover from an illegal combination of distillers on certain rebate vouchers, representing excessive payments for supplies, claiming that the payments had been made under constraint or duress. Holding that no actual duress was shown, and that there were no grounds on which to base the recovery, the Court said, p. 829:

> "At the utmost, the circumstances here assumed show *an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination,*

> because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed."

Certiorari was refused by this Court, (176 U. S. 683).

In *Detroit Edison Co.* v. *Wyatt Coal Co.*, 293 Fed. 489, C. C. A., 4th Cir., Nov. 1923, the plaintiff, which was a public service corporation supplying heat, light and power in Detroit, Michigan, and engaged at the time in furnishing its services to the Government for war work, sought to recover from the defendant certain amounts illegally exacted by the defendant for coal sold to the plaintiff, which amounts the plaintiff claimed it *had been compelled to pay, by the nature of its business, in order to secure prompt deliveries.* It was held that, inasmuch as the extra payments were in violation of the statute, to which violation the plaintiff contributed, under the well established rule, the Court would not permit a recovery. At p. 492, Waddill, *Circuit Judge,* said:

> "Conceding that the plaintiff's conduct in the transaction was less reprehensible and less flagrant than that of the defendant, still, without the plaintiff's co-operation with the defendant, the latter's effort would have proven abortive, and there would have been no actual and effective violation of the law.

> * * * It is true the plaintiff paid out money which it need not have done; but that does not avail it, since in this class of cases the law will not lend itself to afford one of two wrongdoers relief against the other."

See also, as to what constitutes legal coercion or duress.

> *Radich* v. *Hutchins*, 95 U. S. 210, 213.
> *Chesebrough* v. *United States*, 192 U. S. 253, 259.

It thus appears that the Circuit Courts of Appeal of the 2nd 3rd, 4th and 7th Circuits have joined with this Court in sustaining the principle here contended for, and in holding that both parties to such an illegal agreement as that disclosed by the present record are *in pari delicto*.

4. The case of *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, is not in conflict with the foregoing argument. In that case certain bill posters and twelve advertising agents, styled "official solicitors," were charged with having formed an illegal combination. The case came up on demurrer to the complaint. From the record of the *Ramsey* case in this Court, it appears, (pp. 11, 13), that, prior to July, 1911, the plaintiff had been what was called a "licensed solicitor," by which was meant that he was permitted to solicit business from advertisers and to turn the same over to bill posters who were members of the defendant Association. It does not appear from the complaint that plaintiff was required to do anything illegal, or, if so, that he complied with such requirements.

In July, 1911, a change took place in the methods of the defendants' business, whereby they restricted the number of licensed solicitors to twelve, thereafter termed "official solicitors," and imposed other terms upon their members, and cancelled the license which the plaintiff had theretofore had. The defendants thus formed a new combination, which included twelve official solicitors, but did not include the plaintiff. This latter combination is the one which was found by Landis, *District Judge,* to be unlawful (*U. S.* v. *Associated Bill Posters,* 235 Fed., 540, 541), and it was also apparently this latter combination which this court had in mind, for at p. 510, Mr. Justice McReynolds says:

> "The following were among the means adopted for carrying out the purposes of the combination and conspiracy * * * (d) a schedule of prices has been fixed and members have been prohibited from accepting certain kinds of work from anyone except solicitors (*twelve in all*) arbitrarily selected and licensed."

Both of these references can apply only to the combination as it existed after July, 1911, by which the number of solicitors was for the first time restricted to twelve. It was not until the new combination had been made that plaintiff suffered any damage or made any complaint (see Record in *Ramsey* case, p. 13). Hence, we assume that the language used by Mr. Justice McReynolds has no bearing upon any combination except the one made July, 1911, when he says, at p. 512:

> "We find no adequate support for the claim that plaintiffs were parties to the combination of which they *now* complain."

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, and *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, do not help the defendant-in-error. The *Connolly* case is clearly distinguished in *Continental Wall Paper Co.* v. *Voight & Sons Co.*, 212 U. S. 227, at p. 260, and a similar distinction is made in the *Corn Products* case, 236 U. S. at p. 177.

SECOND: The amount of the profits earned by defendant-in-error, while a customer of the plaintiff-in-error, it being a participant in the latter's unlawful acts and therefore *in pari delicto,* cannot be used as a standard by which to measure damages alleged to have been sustained by the defendant-in-error after it had ceased to be such customer.

1. The only measure of damages proposed by defendant-in-error and allowed by the Court was the *assumed net profits* which defendant-in-error claims it would have made after it ceased to be an Eastman customer, had it been allowed to purchase Eastman goods at dealers' discounts, such net profits being arrived at by taking the *actual gross profits* which defendant-in-error claims to have made during the period before it so ceased, and deducting therefrom a speculative cost of conducting the increased business, which it is claimed would have resulted from the handling of Eastman goods. In short, the whole recovery hinged upon the use of the alleged *gross* profits of the earlier period, as a standard of comparison by which to determine the amount of *net* profits claimed to have been lost in the later period.

It is well settled that one may not use the earnings or profits which he made in the course of a violation of law, or in a business which was illegal, as a measure of the damages which he suffered after the date when he claimed that his business was interrupted.

Riggs et al. v. *Palmer, et al.*, 115 N. Y. 506, 511.

Murray v. *Interurban Street Railway Co.*, 118 A. D. 35, (N. Y.), 1907.

Victor Talking Machine Co. v. *Kemeny*, 271 Fed. 810, 819, (C. C. A., 3rd Cir., Mar. 1921).

Eastman Kodak Co. v. *Blackmore*, 277 Fed. 694, 699 (C. C. A., 2nd Cir., Dec. 1921).

Raynor v. *Valentin Blatz Brewing Co.*, 100 Wisc. 414.

In *Riggs et al.* v. *Palmer, et al.*, 115 N. Y. 506, Earl, *J.*, says at p. 511:

> "All laws as well as all contracts may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes."

In *Murray* v. *Interurban Street Railway Co.*, 118 A. D. 35 (N. Y. App. Div., 1907), the Court

refused to allow a gambler, who had been injured in a street railway accident, to prove the profits previously made by him as a gambler as a basis for estimating his losses resulting from the accident. Referring to *Riggs et al.* v. *Palmer, et al., supra,* the Court says at p. 37:

> "The plaintiff according to his own testimony was violating the law, and when a person is committing a crime, he cannot use the wages paid to him for doing it as the basis for a recovery in a civil action. (*Riggs* v. *Palmer,* 115 N. Y. 506). * * * The law does not permit proof of its violation for the purpose of enriching the pockets of the violator."

In *Victor Talking Machine Co.* v. *Kemeny,* 271 Fed., 810, 819, Woolley, *Circuit Judge,* said:

> "We are constrained to hold that the learned trial judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."

In *Eastman Kodak Co.* v. *Blackmore,* 227 Fed. 694, at p. 699, Mayer, *C. J.,* said:

> "If plaintiff and defendant were engaged in an illegal restrictive system, from 1899 to 1902, obviously that period cannot be set up

> as a standard with which to compare the profits of the period after 1908. It is necessary upon this point to refer merely to what was said in *Victor Talking Machine Co.* v. *Kemeny, supra,* at pages 818 and 819."

In *Raynor* v. *Valentin Blatz Brewing Co.*, 100 Wisc. 414, where it was sought to measure damages by the profits made in the operation of a theatre and saloon on Sundays, the Court said, p. 420:

> "But the profits of an unlawful business cannot be any proper basis for the estimate of damages. This would seem to be too clear for argument. * * * the profits made on Sundays, resulting from a criminal violation of the Sunday law, cannot form any legal basis for the estimate of damages."

The decision in *Ramsey* v. *Associated Bill Posters,* 260 U. S. 501, has no bearing upon this point. There was no question there of damages, as the case was before the Court on demurrer to the complaint.

2. The soundness of this general proposition was indeed conceded by the learned Trial Judge in his charge in the instant case (Rec. 429-30). He said:

> "The fact that he (the plaintiff) was dealing with a monopoly, may affect this case notwithstanding, *when you come to fix the measure of damages, because he can't recover for the future on the basis of profits that he made under monopolistic conditions in the business,* if those profits were increased by the monopoly."

The learned Judge, however, erred by telling the jury that they might analyze the plaintiff's gross profits of the earlier period and determine for themselves how much of such profits was due to monopolistic conditions and how much was purely normal and that they might then take the amount of such assumed normal profits as a measure of damages. (Rec. 429-30).

Even if such analysis had been legally permissible, there was no proof whatever upon which could be based a segregation of monopolistic from normal profits. But in fact, the rule of law so announced is contrary to the doctrine of all the cases cited above on this point.

Continental Wall Paper Co. v. *Voight & Sons Co.*, 212 U. S. 227, 262.

This point is raised by specifications of error Nos. 1, 3c, 5a, 6 and 7c, d, e (*supra*, pp. 22-29).

POINT III.

There was no proof of damages such as, under the authorities, is necessary to enable plaintiff, in cases under the Anti-Trust Acts, to recover any damages whatever.

Keogh v. *Chicago & Northwestern R. R. Co.*, 260 U. S. 156.

Central Coal & Coke Co. v. *Hartman*, 111 Fed. 96, C. C. A., 8th Cir., 1901.

Locker v. *American Tobacco Co.*, 218 Fed. 447, C. C. A., 2nd Cir., Nov. 1914.

American Sea Green Slate Co. v. *O'Halloran*, 229 Fed. 77, C. C. A., 2nd Cir., Dec. 14, 1915.

Cramer v. *Grand Rapids Showcase Co.*, 223 N. Y. (Court of Appeals) 63, 68 (Feb. 1918).

I. In *Keogh* v. *Chicago & Northwestern Ry. Co.*, *supra*, at pp. 164-165, this Court laid down the rule of damages as follows:

> "Under Section 7 of the Anti-Trust Act, as under Section 8 of the Act to Regulate Commerce (*Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184), recovery cannot be had unless it is shown that, as a result of defendants' acts, damages in some amounts susceptible of expression in figures resulted. *These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture.*"

A footnote refers to *Central Coal & Coke Co.* v. *Hartman, Locker* v. *American Tobacco Co.*, and *American Sea Green Slate Co.* v. *O'Halloran*, *supra*, all of these being cases under the Seventh Section.

In *American Sea Green Slate Co.* v. *O'Halloran*, 229 Fed. 77 (C. C. A., 2nd Cir., Dec. 14, 1915), Lacombe, *Circuit Judge*, said at p. 79:

> "To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. *These damages must be proved by facts from which their existence is logically and legally inferable*—not by conjectures or estimates. *They must not be speculative, remote or uncertain.*"

In *Central Coal and Coke Co.* v. *Hartman*, 111 Fed. 96 (C. C. A., 8th Cir., 1901) at pp. 98-9, Sanborn, *Circuit Judge*, said:

> "Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. * * * The anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. *Howard* v. *Manufacturing Co.*, 139 U. S. 199, 206; *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.*, 152 U. S. 200, 205; *Trust Co.* v. *Clark*, 92 Fed. 293, 296, 298; *Simmer* v. *City of St. Paul*, 23 Minn. 408, 410; *Griffin* v. *Colver*, 16 N. Y. 489, 491. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. * * * *The interest upon his capital and the expenses of his business deducted from its income for a few months or years prior to the interruption produce the customary monthly or yearly net profits of the business during that time, and form a rational basis from which the jury may lawfully infer what these profits would have been during the interruption* if it had not been inflicted. The interest on the capital and the expenses deducted from the income during the interruption show what the income actually was during this time; and this *actual net income*, compared with that which the jury infers from the data to which refer-

> ence had been made the *net income* would have been if there had been no interruption, forms a basis for a reasonably certain estimate of the amount of the profits which the plaintiff has lost. * * * *And one who seeks to recover for the loss of the anticipated profits of an established business without proof of the expenses and income of the business for a reasonable length of time before as well as during the interruption is in no better situation.* In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery."

This decision of Judge Sanborn has also been approved in the following cases, among others:

> *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.*, 160 Fed. 948, 961, (C. C. A., 6th Cir., 1908).
>
> *Montgomery* v. *C. B. & Q. R. R. Co.*, 228 Fed. 616, 620-21, (C. C. A., 8th Cir., Nov. 1915).

And the same rule in almost the same words is laid down in *Cramer* v. *Grand Rapids Showcase Co.*, 223 N. Y., Court of Appeals, 63, 68, decided Feb. 1918.

2. The evidence as to damages in the instant case is collated in the Statement of the Case (pp. 15-21). It is clear that in no singular particular does this evidence conform to the rule laid down in the preceding cases.

(a) Defendant-in-error offered no proof of the amount of its capital either before or after the alleged interruption, and either as to the whole

amount invested in its entire business or as to the amount invested in that part of the business which concerns Eastman goods.

(b) The sale of Eastman goods formed only a small part of the total sales of defendant-in-error. See table, p. 21, from which the following appears:

Year	*Plaintiff's Sales of Eastman Goods* (Rec. 212)	*Plaintiff's Total Sales*
1906	$34,494.97	$90,404.65 (Rec. 313)
1907	35,208.48	105,205.13 (Rec. 289)
1908	29,196,06	101,682.47 (Rec. 335-6)
1909	32,258.04	91,876.00 (Rec. 236)

The only evidence as to expenses was as to the expenses of the entire business (See table, p. 21). Defendant-in-error made no attempt to show its separate cost of handling Eastman goods and in the nature of things none could be made because its business was conducted as an entirety and not in separate departments. Hence, it was impossible for the jury to say what the "customary monthly or yearly *net profits* of the business" of defendant-in-error in Eastman goods were before the alleged interruption.

(c) If the entire business be considered as a unit and the total expenses and cost of goods be deducted from the entire receipts, then the defendant-in-error lost money in 1908 and 1909; whereas, in 1910 and 1911 after the alleged interruption, it cleared a substantial net profit (Statement of Case, pp. 17-18, 21).

(d) The statements of the witness Goodhart that he could have handled Eastman goods after the alleged interruption at an expense of only "five per cent" were pure "conjecture, or estimate" and were "speculative, remote and uncertain" (to use the words of Lacombe, *Circuit Judge,* in *Slate Co.* v. *Halloran, supra*). The testimony was a guess on the witness' part and it was error to allow the jury also to guess from such testimony what damages, if any, the plaintiff suffered.

3. There is no provision in any of the decisions cited above for allowing the plaintiff, in such cases, to estimate that his total sales would have been increased, if permitted during the period when he was unable to procure the goods in question.

The precise point was decided by the Appellate Division of New York State, in 1904, in *Horton* v. *Hall & Clark Mfg. Co.*, 94 A. D., 404, at p. 408, holding that no evidence of increase was admissible.

Moreover, Sibley, *J.*, held to the same effect in his opinion overruling the demurrers in the instant case, where he says (Rec. 661):

> "I do not think the claim that the business was growing at a given percentage per year could project into the future the same growth. That would involve too much of a speculation."

Frey v. *Welch Grape Juice Co.*, 240 Fed. 114, was reversed and dismissed by the Circuit Court of Appeals in the 4th Circuit (261 Fed. 68), in view of *U. S.* v. *Colgate & Co.*, 250 U. S. 300.

Hence, it is clear that the plaintiff in that case at no time had any cause of action against the defendant. The case should have been dismissed at the threshold, and in any event does not apply to the facts in the instant case.

4. No attempt was made by defendant-in-error to prove any damages resulting from the acquisition by plaintiff-in-error of competing concerns. However, all of the goods, right to make which was thus acquired (except photographic plates), were at once added to the terms of sale, which were thereafter acquiesced in and agreed to by defendant-in-error (Rec. 322, 250). Photographic plates did not appear in the terms of sale, because plates were never restricted (Rec. 322); but defendant-in-error could get all the plates it wanted, either before or after it ceased dealing with the Eastman Company (Rec. 263), and the discounts on Stanley, Seed and Standard plates were the same after as before their acquisition by plaintiff-in-error (Rec. 196), so that no possible damage resulted to defendant-in-error from such acquisition. "Appendix II" hereto annexed is a table showing the principal acquisitions as to which any proof was offered, and the Terms of Sale in which the corresponding goods subsequently appeared.

5. The case of *Lincoln* v. *Orthwein*, 120 Fed. 880, was not brought under the Anti-Trust Acts and was decided before any of the cases cited in this brief on the point of damages. Moreover, in that case, the plaintiff proved the net profits of his business before the interruption.

In the instant case, defendant-in-error has utterly failed to prove such net profits. So that there is no basis for an estimate of what its profits might have been after April, 1910.

6. The assumption that, had defendant-in-error handled Eastman goods after April, 1910, it would have sold at least as great a quantity of them as before that date is entirely speculative, not based on any data from which the jury could make any logical inference, and besides is discredited by the other conditions of the business of defendant-in-error after the date named. For, beginning with March, 1910, defendant-in-error bought much more of Ansco goods per year than it had ever before bought of Eastman goods in a like period (Statement of the Case, p. 15); and it is contrary to all mercantile experience to suppose that a merchant could take on an entirely new line of similar goods, make largely increased sales of them, and not place many of them with his old customers. How could it be otherwise? Where would a merchant first look to place his new line except with those who were accustomed to resort to his shop or were among those from whom he regularly solicited trade? And for every sale of Ansco goods thus made, his sales of Eastman goods would be so much less. But not only would this law of human and business experience apply, but also defendant-in-error bound itself, by every means and device known to the progressive merchant to push Ansco goods at the cost of all others (Rec. 243). The figures best show how completely defendant-in-error would have done this; for its purchases

of Eastman goods never exceeded $26,364.87 in any one year (Rec. 236), whereas, in its first year with Ansco goods, it purchased of them $50,437.26, and these purchases increased by 1915 to $104,108.89 in a single year (Rec. 246).

This point is raised by specifications of error Nos. 1, 3, 4, 5, and 7a, b, (*supra*, pp. 22-24, 26-7).

POINT IV.

The burden was on the defendant-in-error to prove affirmatively that plaintiff-in-error, in refusing to sell the defendant-in-error at dealers' discounts after April, 1910, was actuated by a monopolistic motive. This was not done. Hence, such refusal, being within the legal rights of plaintiff-in-error, was not a legal wrong which could form the basis of any recovery.

1. The defendant-in-error offered no proof as to the reason why plaintiff-in-error declined to continue defendant-in-error as a customer on the terms formerly in force between them. The presumption is that the refusal was made either for good or for purely indifferent reasons, and that it was therefore entirely legal. (*United States* v. *Colgate & Co.*, 250 U. S. 300, 307.) This presumption not having been overcome, the plaintiff-in-error was entitled to a dismissal or a direction on this ground alone.

2. The record, it is true, fails to show expressly whether plaintiff-in-error knew the provisions of the Ansco contract at or about the time it was

College Ford case 20 of 105

entered into. The defendant-in-error on its part assumed that plaintiff-in-error had such knowledge (Rec. 167). In any event, since these provisions, if known, would have furnished a lawful reason for terminating the relations between the parties, we submit that, even if the plaintiff-in-error was not aware of them at the time, it should be permitted to take advantage of them when they became known to it. This is the well-established rule in the law of Master and Servant.

In *Re Nagle*, 278 Fed. 105, 109, C. C. A. 2nd Cir. 1921.

Farmer v. *First Trust Co.*, 246 Fed. 671, 673, C. C. A. 7th Cir. 1917.

Carpenter Steel Co. v. *Norcross*, 204 Fed. 537, 539, C. C. A. 6th Cir. April, 1913.

Also, in the law of Agency:

Sanborn v. *United States*, 135 U. S. 271, 278.

McGar v. *Adams*, 65 Ala. 106, 109.

Substantially the same rule applies wherever a fiduciary relation exists. An apparently contrary rule in the law of Contracts has been modified so that it no longer conflicts with the foregoing authorities.

Strasbourger v. *Leerburger*, 233 N. Y. Ct. Appeals, 55, 60, Decided February, 1922.

Granger Co. v. *Universal Mach. Corp. Ltd.*, 193 N. Y. App. Div. 234, 235. Decided July, 1920.

In the *Granger Company* case, the contrary rule was held to apply only "when the party, with full knowledge of all the objections on which he might rely, deliberately and formally assigns certain objections and is silent as to others."

3. The existence and operation of the Ansco contract with its unfair provisions having been admitted, the jury should not have been permitted to ignore the effect of that contract, nor to charge plaintiff-in-error, in the absence of any proof, with an unlawful purpose in ceasing to sell its recreant customer.

This point is raised by specifications of error Nos. 5c, d, (*supra*, p. 25).

POINT V.

The judgment should be reversed and the cause remitted to the United States Circuit Court of Appeals for the Fifth Circuit, with instructions to enter a judgment of reversal, which judgment so to be entered shall direct the cause to be further remitted to the United States District Court for the Northern Division of the Northern District of Georgia, with instructions to enter a judgment in favor of the plaintiff-in-error, defendant below.

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APPENDIX I.

The intention of Congress in changing the language of Section 12 of the Clayton Act, from that used in Section 7 of the Sherman Act, is made clear by reference to the legislative proceedings.

Duplex Co. v. *Deering*, 254 U. S. 443, 474-5.

The Clayton Act was introduced as H. R. 1567 on April 14, 1914, and referred to the Judiciary Committee of the House, from which it was reported on May 6, 1914 (H. Rept. 627). The section now numbered 12, was then reported as Section 10, and read in respect to this point:

> "Sec. 10. That any suit, action or proceeding under the Anti-trust laws, against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found."

In the report of the House Judiciary Committee accompanying the bill, appears the following:

> "Venue.—Sec. 10 relates to procedure and provides that any suit, action or proceeding under the Anti-trust laws, against a corporation, may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found."

In the House debate, some question seems to have arisen as to the meaning of the word "found," as used in the bill, which word some members thought applied only to the state of incorporation, whereupon Congressmen Floyd,

Century Camera Co. Century Cameras and other Century goods.	Terms of Sale of Jan. 12, 1904, Plff's. Ex. 40 (Rec. 579); of Jan. 22, 1907, Def. Ex. 28 (Rec. 597), and of Jan. 1, 1908, Plff's Ex. 41 (Rec. 584).
Rochester Optical Co. Premo and other cameras. Film pack. All other "Rochester Optical" goods.	Terms of Sale of Jan. 12, 1904, Plff's. Ex. 40 (Rec. 579); Jan. 22, 1907, Def. Ex. 28 (Rec. 597, 599); Jan. 1, 1908, Plff's. Ex. 41 (Rec. 585, 589).
Folmer & Schwing Mfg. Co. Graflex and other cameras.	Terms of Sale of Jan. 22, 1907, Def. Ex. 28 (Rec. 597) and of Jan. 1908, Plff's. Ex. 41 (Rec. 585).
Photo Materials Co. American Aristotype Co. Nepera Chemical Co. New Jersey Aristotype Co. Kirkland Lithium Paper Co. General Aristo Co.	Terms of Sale of May 1, 1901, Def. Ex. 2 (Rec. 591, 594) being the terms of sale sent to plaintiff, Sept. 17, 1901, and acknowledged by it (Rec. 204-5).
Joseph DiNunzio Angelo Platinum Paper.	Terms of Sale of Jan. 22, 1907. Def. Ex. 28 (Rec. 597).
Artura Paper Co. Artura Paper.	Acquisition approved by plaintiff in letters (Rec. 231-3).
Contracts with General Paper Co. (Rec. 18-19).	Original contract made in December, 1898. Matter of common knowledge and well known to plaintiff before plaintiff became defendant's customer. Covered by various terms of sale.

Seed Dry Plate Co. Standard Dry Plate Co. Stanley Dry Plate Co.	Never restricted. Discounts not changed by defendant. Readily obtainable (Rec. 263). Plaintiff received discounts on purchases of these plates. (Rec. 196).
Specific goods enumerated in petition Aristo Platino, Aristo Junior, Aristo Self-toning, American Platinum, American Aristo Collodio Carbon Papers.	Terms of Sale of May 1, 1901, Def. Ex. 2 (Rec. 594).
Aristo Gold, Aristo Carbon Sepia, Angelo Platinum Papers. No. 2 Brownie Developing Box. F. & S. Printing & Enlarging cameras. Various Kodaks.	Terms of Sale of Jan. 22, 1907. Def. Ex. 28 (Rec. 597, 600).
Circuit Cameras	Terms of Sale Jan. 1, 1908, Plff's. Ex. 41 (Rec. 584).
Panorama Kodaks	Terms of Sale of April 15, 1901, Plff's. Ex. 39 (Rec. 575).
Commercial Aristo	Terms of Sale of Oct. 1900, Plff's Ex. 38 (Rec. 574).

No. 270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923 1925

EASTMAN KODAK COMPANY OF NEW YORK,
Petitioner,

vs.

SOUTHERN PHOTO MATERIAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Daniel MacDougald,
J. A. Fowler,
Attorneys for Respondent.

JOHNSON-DALLIS CO., ATLANTA, GA.

IN THE

Supreme Court of the United States

EASTMAN KODAK COMPANY OF NEW YORK, Petitioner, vs. SOUTHERN PHOTO MATERIAL COMPANY, Respondent.	Petition for Writ of Certiorari, to the United States Circuit Court of Appeals, Fifth Circuit.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Now comes the Southern Photo Material Company, in response to the petition for Writ of Certiorari, and respectfully showeth to the Court as follows:

I.

The above case is one in which the writ of certiorari should not issue, for that it is quite clear that the judgment of the Court of Appeals in this case is not made final by Statute.

II.

The writ of certiorari should not issue, for that the Circuit Court of Appeals committed no error prejudicial to petitioner in the judgment rendered by it.

III.

The questions raised are wholly free from doubt and do not warrant the issuance of the writ.

In view of the fact that the petitioner has obtained a writ of error in this case, we will not burden the Court with a response going into the merits of the case, but will, by a motion to dismiss the writ of error and to affirm the decision of the Court of Appeals, call the Court's attention to the fact that the venue of the suit was based upon Section 12 of the Clayton Act, (38 Stat. 736) in the District where the respondent (defendant in the District Court) transacted business and service had in the District of which it was an inhabitant. The record discloses that respondent transacted an extensive interstate business in the State of Georgia and Northern District, having 126 dealers who were its customers, (pages 752 to 756 of the record) and one professional stock house in the city of Atlanta that handled petitioner's line exclusively, and furthermore, did an extensive local business by resident demonstrators. (Pages 774 and 775 of the record).

That the venue was propery laid is evidenced from an inspection of Section 12 of the Clayton Act. See the case of Frey & Sons vs. Cudahy Packing Co., 228 Fed. 209.

That this is true is recognized by this Honorable Court in the case of General Investment Company vs. Lakeshore, Adv. Op. 67 Law Ed. 115.

The rule of substantive law sought to be invoked is without merit, for that the record shows that the respondent was not in pari delicto.

The particular act of the petitioner in creating and extending the scope of its monoply, directed towards re-

spondent and out of which the respondent's damage grew, was the refusal of the petitioner to sell to respondent the merchandise upon which it held a monopoly after petitioner had purchased the two competing stock houses in the city of Atlanta (pages 165 to 169 of the record), although respondent had had an established trade upon such articles, and had for ten years purchased such goods from petitioner, and independent concerns subsequently acquired by petitioner (pages 149 and 150 of the record) and the business of the respondent had increased with petitioner from year to year, (page 212 of the record) and the respondent had discounted its bills with petitioner each and every month of this period. (Page 171 of the record).

To purchase goods from the only available source does not create an illegal relationship, even though the vendor be engaged in creating an illegal monoply.

Conolly vs. Union Pipe Co., 184 U. S. 540.

Wilder Mfg. Co. vs. Corn Products Co., 236 U. S. 165.

To do business with an illegal monoply upon the only terms and conditions permitted (page 171 of the record and pages 179 to 181) does not create an illegal relationship.

Chas. A. Ramsey vs. Associated Bill Posters.

W. H. Rankin Co. vs. same defendant.

(Decided on January 2nd, 1923, Adv. Opinion, L. Co-op., 67 L. Ed., page 208).

Thus we respectfully submit the qestions raised by petitioner are frivolous and entirely without merit, both on the question of venue and the supposed application of the doctrine of pari delicto.

Respectfully submitted,

DANIEL MacDOUGALD,
J. A. FOWLER,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

NO. 270. 31 6

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

SOUTHERN PHOTO MATERIAL COMPANY,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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Of Counsel.

JOHNSON-DALLIS CO., ATLANTA, GA.

INDEX.

TABLE OF CASES

Supreme Court of the United States

October Term, 1924

EASTMAN KODAK COMPANY OF NEW YORK,
Plaintiff in Error,
vs.
SOTHERN PHOTO MATERIAL CO.,
Defendant in Error,

No. 270

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The Southern Photo Material Company (hereinafter called the plaintiff) brought suit against the Eastman Kodak Company (hereniafter referred to as the defendant) to recover damages for an injury to its business caused by the defendant's violation of the Act of July 2, 1890, known as the Sherman Anti-Trust Act.

Suit was predicated on Sections 1 and 2 of that Act, and sought to recover triple damages, as provided in Section 7.

The venue of the suit was based upon Section 12 of the Clayton Act (38 Statutes, 736), in the district where the defendant transacted business, and service was had in the district of which it was an inhabitant.

A traverse of the service and plea to the jurisdiction were overruled. The case proceeded to trial and resulted in a verdict and judgment for the plaintiff, which was affirmed by the Circuit Court of Appeals for the Fifth Circuit. (295 Fed., page 98).

The case is before this honorable court on writ of error.

I.

STATEMENT OF FACTS.

The petition charged that the defendant had illegally monopolized interstate trade in photographic supplies and material, consisting of cameras, films, plates and photographic paper and that this monoply covered 75% to 80% of the entire photographic trade in the United States.

That this monopoly was brought about by wrongful contracts with regard to raw paper stock which prevented the trade from obtaining such stock, by acquiring competing Plants, businesses and Stock Houses, dismantling acquired Plants and restraining the vendors from re-entering the business and imposing on photographic dealers arbitrary and oppressive terms of sale and other regulations inconsistent with fair and free dealing and arbitrarily enforcing the same by a system of espionage and the keeping of records of violations with the view of penalizing the dealer by forfeiting a large part of the dealer's discount, or discontinue selling such dealer for violation of any of these arbitrary regulations.

The petition set forth in detail the numerous transactions of the nature and class herein designated.

The petition further charged that the defendant had not only acquired a monopoly in the manufacture and sale from its Plant of photographic supplies and materials but that the defendant had acquired a complete monopoly in the distribution of amateur photographic supplies, consisting of cameras and films and in addition thereto was attempting to extend its monopoly to the distribution of professional photographic apparatus and supplies to professional pho-

tographers by the acquisition of professional Stock Houses and the elimination of competitors of such acquired Stock Houses. To so monopolize the distribution to professional photographers would eliminate potential competition. That as a part of this illegal plan and conspiracy, the defendant had purchased twenty competing Stock Houses in the important cities of the United States, and had purchased two Stock Houses in the city of Atlanta which were the only local competitors of the plaintiff, and then purchased the only Stock House at New Orleans, another competitor of the plaintiff, and had attempted to purchase the business of the plaintiff, but when the plaintiff refused to sell, hired the plaintiff's traveling salesman, its bookkeeper, who was its confidential man, and its stock man and manager of the store.

That the defendant consolidated the two Stock Houses purchased in Atlanta, continuing the consolidated business under the name of the Glenn Photo Stock Company, a Georgia Corporation, that thereupon the defendant refused to sell the plaintiff its photographic supplies and materials, except at the same prices that photographers could purchase these goods from the Glenn Photo Stock Company.

That the refusal to sell to the plaintiff was a part and parcel of the defendant's illegal plan and conspiracy to monopolize the trade in photographic supplies.

That by reason of this refusal to sell to the plaintiff on the part of the defendant, the plaintiff was unable to supply its established trade with useful and necessary articles used by such photographers, as these products could not be obtained elsewhere because of the defendant's monopoly of such products and that the plaintiff lost the income to its established business of the profits on such sales so lost to it.

The defendant denied that it was an illegal monopoly,

denied that it had discontinued selling the plaintiff with an illegal purpose but merely refused to sell the plaintiff by virtue of its right to select its customers and by amendment set up that the plaintiff discontinued handling the defendant's line. The defendant also contended that the plaitiff was in pari delicto and could not recover, even though the defendant had created an illegal monopoly and had illegally refused to sell the plaintiff, thereby causing the plaintiff damage.

The defendant further contended that the plaintiff had sustained no damage by reason of its inability to obtain the Eastman goods.

All these issues were submitted to the Jury.

The assignments of error, while numerous and verbose present but few questions which rapidly dissolve in the face of the evidence.

EVIDENCE.

As provided in Section 5 of the Clayton Act, the decree in the Government case was introduced in evidence and the record upon which said decree was rendered was likewise introduced in evidence.

The record consisted of:

Government Petition,

The answer of the defendant in that case,

The opinion of Judge Hazel,

The final decree in that case,

The solemn admission in Court that the appeal to the Supreme Court in that case had been withdrawn from that Court by the defendant.

The final decree following the withdrawl of the appeal.

The plaintiff's petition was an exact replica of the Government suit in so far as the charge relating to the nature and extent of the monopoly and the method and acts by which same was created. It is well to note that in the Government petition, the purchase of the two Stock Houses in Atlanta and the one at New Orleans, and the operation by the defendant of the Glenn Photo Stock Company were charged as done in execution of the plan and conspiracy to create the illegal monopoly and such was found to be the fact by Judge Hazel.

The defendant introduced no evidence to rebut this evidence or to support its denial of having created an illegal monopoly and went to the Jury admitting that it had il-

legally conspired to and had illegally monopolized the trade in photographic supplies.

Plaintiff operated what is known as a Photographic Stock House, selling photographic supplies to professional photographers and advanced amateurs, soliciting orders from such photographers through traveling salsemen and by mail, in the Southern States. It commenced business in 1901 with a complete line of such merchandise. Its business was located on Central Avenue, near the Union Depot. The plaintiff manufactured mounts, but all the other articles, constituting professional supplies and apparatus were purchased from other manufacturers. It placed a large order with the Eastman Kodak Company and continued to thereafter deal with the Eastman Kodak Company until April, 1910, when the Eastman Kodak Company withdrew all discounts and refused to sell the plaintiff any goods, other than at the same prices that these goods were sold to the professional photographers, in other words, at the same price at which professional photographers could purchase goods form the Glenn Photo Stock Company, the Eastman owned house.

At the time the plaintiff placed its initial order with the Eastman Kodak Company, this concern declined to fill the order until their representative had called on the plaintiff and explained the method of doing business by this Company and this representative gave the plaintiff the option of purchasing goods under these methods or doing without them. (Pages 175 to 179 of the record.)

Then it was that the plaintiff encountered "The terms of sale." Under these terms of sale, the purchaser was prohibited from selling competing goods to photographers and was absolutely prohibited from selling Eastman goods to a dealer for resale.

The plaintiff when it started business, purchased goods

from a number of other Manufacturers whose merchandise did not then compete with the defendant.

These concerns were:

Taprell Loomis & Company,

Stanley Dry Plate Company,

Standard Dry Plate Company,

Seed Dry Plate Company,

Rochester Optical Company,

Falmer & Swing Company,

Century Camera Company.

These concerns were subsequently acquired by the Eastman Kodak Company. The plaintiff continued to purchase goods from these Manufacturers, from the time it commenced business until these concerns were acquired by the Eastman Kodak Company and then from the defendant up to and until the refusal of the defendant to longer sell the plaintiff in 1910. Thereafter plaintiff could not secure such products from anyone. (Pages 149 and 150 of the record.)

The plaintiff discounted its bills with the defendant each and every month from 1901 to April, 1910. (Page 171 of the record.) The business of the plaintiff was well organized and in competent and energetic hands. It was increasing from year to year, despite the limitations placed thereon by the defendant under the terms of sale.

Its business increased from year to year with the plaintiff up through 1907. There was a slight falling off in the volume of its business in 1908 and 1909. (Page 212 of the record.) This falling off in business was due entirely to the restrictions imposed on the plaintiff by the defendant.

The explanation of this loss and an illustration of the restrictions imposed upon the defendant is as follows:

There had been a complete change in the character of photographic paper used by professional photographers. The process changed from a printing out paper to a developing out paper, the former a daylight process, the other a gas light process, which could be carried on either at night or day.

The Artura Paper Company was the originator of the new process paper, and had absorbed the market for high and medium grade portrait work. The paper was known as Artura.

The Eastman Kodak Company successfully produced a developing out paper of a cheap grade for use in the cheaper studios, known as Azo paper, but utterly failed to produce such a paper for portrait work in medium or high grade studios.

The Eastman Kodak Company undertook to force the trade to use the old type paper in its portrait work and prohibited the dealers, among them the plaintiff, from purchasing this new paper from the manufacturer. The result of this is apparent from the following figures of sales by the plaintiff of the old process Eastman paper for high grade work in 1907, 1909 and 1910:

NAME OF PAPER.	1907.	1909.	3 mos. of 1910.
Aristo Platino	$ 9,308.95	$2,985.25	$402.70
Aristo, Jr.	618.18	372.20	40.40
Angelo Platino	743.56	678.75	45.15
Self-Toning	140.35	20.90	2.09
American Platinum	400.16	327.55	10.83
Aristo Gold	335.12	208.95	36.59
Collodion Carbon	128.62	107.70	9.80
TOTAL	$11,674.94	$4,701.30	$547.56

(Pages 184 and 185 of the record.)

As a contrast the sales of the Eastman cheap developing paper known as Azo by the plaintiff were:

1907.	1909.	3 mos. of 1910.
$3,933.30	$6,991.70	$2,904.53

The Artura Paper Company offered the plaintiff the exclusive agency for this paper on December 12th, 1907, in North Carolina, South Carolina, Tennessee, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas and Texas, at a 40 per cent. discount, and renewed the offer in 1908. (Pages 181 and 182 of the record.) Although this new process paper had knocked the old process paper out of the market (Page 184 of the record), the plaintiff could not handle this paper on account of the terms of sale.

The Artura Company opened its stock house in Atlanta and plaintiff could not compete for this business. Artura was a success. The inevitable result happened.

The Eastman Kodak Company acquired the Artura Plant in January, 1910, and dismantled same, but continued the manufacture of this product. In three months of 1910, the plaintiff handled $3,802.20 of this paper.

The Eastman discount allowed the plaintiff on this paper was 33 1-3 per cent. (Page 192 of the record.) This was 7 per cent. less than the independent factory offered to the plaintiff.

That the plaintiff was a competent, efficient merchant is further evidenced by letter of Eastman Kodak Company to the plaintiff, December 16th, 1909, (Pages 171 and 172 of the record) in which they announced the purchase of the Artura Factory and that the usual discount would be 25%, but the plaintiff would receive 33 1-3% because he was

among the limited dealers "who send out and get the business."

Up until the beginning of 1910, the plaintiff's business was confined exclusively to the sale of photographic supplies to professional photographers. It had four salesmen covering the Southern States, but could not sell to dealers because of the terms of sale (Page 150 of the record), although it had the organiganization and facilities.

Plaintiff in the early part of 1910, shortly after the defendant purchased the two Stock Houses in Atlanta, took over the Branch of the Ansco Company in Atlanta, and acquired a line of amateur goods, that is, cameras and films, for sale to dealers. This business did not conflict at all with the sale to professional photographers, but would supplement the business of the plaintiff. There was but slight additional expense in taking on this line or to sell a dealer in a town where the salesmen had gone to solicit from the professional photographer. The gross discount was only 10%. (R 300).

At this time, the plaintiff had a well rounded business. He had a complete line to sell to professional photographers. (Page 151 of the record.) and a complete line of amateur goods to sell to side line houses.

The defendant refused to deal longer with the plaintiff and the refusal is in writing. (See pages 165 to 169 of the record.)

Defendant refused to sell the plaintiff any of its products, even refusing to sell Artura paper or Stanley, Standard or Seed Plates, even though the plates were unrestricted and it had just acquired Artura Paper (Page 169 of the record.)

Defendant refused to accept any orders from the plaintiff

except at retail prices and wrote a customer of the plaintiff who had sent in an order direct, that the order could be filled from the Glenn Photo Stock Company. (Page 170 of the record.)

The refusal of the Eastman Company to longer sell the plaintiff had no effect on the plaintiff's sale of amateur goods, such as Kodaks and films to side line houses, because Eastman never permitted the sale of such goods to dealers. The refusal of the defendant to sell the plaintiff only affected the plaintiff's business with professional photographers.

As a result of the defendant's refusal to deal with the plaintiff, the plaintiff's line of professional supplies was shot to pieces. Thereafter plaintiff could supply not more than 50% in value of the initial equiment of a high grade Studio and 25% in value of the initial equipment of a cheap or medium grade studio and of the supplies consumed by such professional photographers in the operation of their business, could supply not over 25% in value of such supplies. (Page 301 of the record.)

The articles of merchandise which the plaintiff could not thereafter supply were in general use by photographers and continued so throughout the period covered by this suit. (Page 190 of the record.) The plaintiff still had and had for ten years prior thereto an established trade in such articles, but such trade on such articles and the profits resulting therefrom were utterly lost to the plaintiff. These articles were detailed at length in the evidence, as well as the business done by petitioner in these articles year by year for four years preceding the time Eastman cut the plaintiff off as a dealer. (See pages 184 to 189 of the record.)

The evidence shows in detail the organization of the plaintiff's business. (See pages 186 and 187 of the record.) That the plaintiff had the experience, the capacity, the organiza-

tion and the trade established, but could not obtain these necessary articles because of the defendant's refusal to sell to the plaintiff, this refusal had this result, because the defendant had secured a monopoly of such articles. That plaintiff's business during the period of the suit was operated at 50% of its capacity (Page 305 of the record) and that these articles upon which plaintiff had an established trade, but could no longer supply, could have been handled through this established business at no additional cost, other than the handling cost on such articles and this cost was 5% of the selling price of such articles. The items of cost incident to handling these goods through the established business was also shown. (Page 191 of the record.)

The gross discounts or gross profits formerly realized by the plaintiff on these articles were shown. (See pages 184 to 189 and pages 214-5 of the record.)

No additional overhead, organization, administrative or selling expenses would be incurred in handling a complete line over an incomplete line. (Page 191 of the record.)

Plaintiff's situation, due to the refusal of the defendant to longer sell to it and the monopoly held by the defendant had completely changed. Plaintiff could no longer secure a complete line of professional photographic supplies and apparatus. It had all the expense and the requisite organization to handle a complete line, but could in fact only offer for sale and take orders upon a few limited articles.

A detailed statement of the commodities which the plaintiff could no longer secure and the previous sales, gross profit, and net loss, based on such sales after allowing 5% handling charge, is as follows:

Artura Paper—1910 Sales—4 months, $3802.20—discount 25 and 10—gross profit $1267.40.		
Net loss for 4 months $1077.30.		
Net loss for one year	$3231.90	
Net loss for 4 years and 9 months		$15,351.52
Azo Paper—1909 Sales $6991.70, 1907 sales $3933.30, 4 months 1910 $2904-.53, gross profit 25%.		
Net loss for 1 year	1398.34	
Net loss for 4 years and 9 months		6,642.11
Bromides—1909 Sales—$60.78, 25%.		
Net loss for 1 year	14.24	
Net loss for 4 years and 9 months		67.64
Kresko Paper—1909 Sales—$938.90. Gross profit 25%.		
Net loss for 1 year	187.78	
Net loss for 4 years and 9 months		891.94
Solio Paper — 1909 Sales — $684.76. Gross profit 25%.		
Net loss for 1 year	136.96	
Net loss for 4 years and 9 months		650.56
Velox Paper—1909 Sales—$769.85. Gross profit 25%.		
Net loss for 1 year	152.97	
Net loss for 4 years and 9 months		726.61
Cameras, Outfits and Sundries—1909 Sales—$1724.42. Gross profit 30%, Sundries 33 1-3%.		
Net loss for 1 year	602.15	
Net loss for 4 years and 9 months		2,860.21
Eastman Kodak Chemicals—1909 Sales —$309.01. Gross profit 40%.		
Net loss for 1 year	90.42	
Net loss for 4 years and 9 months		429.49

Stanley Plates—1909 Sales—$4,783.61.		
Gross profit 15%.		
Net loss for 1 year	478.36	
Net loss for 4 years and 9 months		2,272.21
Standard Plates—1909 Sales, $945.32.		
Gross profit 15%.		
Net loss for 1 year	141.80	
Net loss for 4 years and 9 months		673.55
Seed Dry Plates—1909 Sales, $3912.15.		
Gross profit 20%.		
Net loss for 1 year	586.82	
Net loss for 4 years and 9 months		2,787.39
Total net annual loss	$7,021.74	
Total loss for 4 years and 9 months		$33,353.23

(The full year 1909 is used except in the case of Artura paper, which the plaintiff had for only four months of 1910. For comparative sales of old process protrait paper, see pages 184 and 189 of the record, or page 8 hereof.)

In 1909, the plaintiff had 1335 customers, who were professional photographers. In 1910 it had 1975 such customers and in 1911, 2183, showing an increase in the number of customers from 1909 to 1911 of 848, or a 60% increase in numbers. (Pages 195-196 of the record.)

The sales in 1907 to professional photographers were $105,205.13 and only $97,416.86 in 1911. (Page 300 of the record.)

Despite the increased number of customers, the sales to professional photographers continued to decrease each year until 1915, reaching in that year $79,804.22.

The average sales per photographer in 1907 to 1915 were as follows:

1907	$79.00
1909	68.51
1910	48.75
1911	44.62
1914	37.47
1915	36.09

The amount of sales by plaintiff during the period of the suit, of amateur goods to side line houses was shown for each of the years and likewise the sale of mounts to professional photographers was separated from the total sales to such photographers.

The sales to dealers from 1910 to 1915, amounted in the first year to $23,400.08, increasing each year through 1914 to $74,924.31. These sales to dealers were had on a 10% gross profit. Plaintiff had only four dealers in 1909 and they handled mounts. (Page 195 of the record).

The development of this business, that is, sales to dealers was not at the expense of the business with professional photographers, for despite the increase in the former, plaintiff increased the number of professional photographers more than 60% during this period.

That the annual sales to professional photographers should have decreased on an average from $79.00 to $36.09 in 1907 to 1915, is due solely to the monopoly which defendant had on such articles, and the plaintiff's inability to longer supply its trade with such articles was due to the refusal of the defendant to sell the plaintiff such articles.

The verdict was totally inadequate to meet the loss sustained by plaintiff, even though the amount be trebled.

There is not one iota of evidence in the record that the plaintiff was ever a party to any plan or scheme of the de-

fendant to monopolize the photographic trade. The only evidence in the record is that the plaintiff purchased the goods upon the only terms upon which they could be obtained and sought to protect the limited rights which he had under these terms.

E. H. Goodhart testified for the plaintiff that the Eastman Kodak Company never consulted him about creating a monopoly or any scheme it took in securing a monopoly either as to the purchase of a competitor or stock house or dismantling said plant or their raw paper contracts or the terms of sale. They merely gave him the option of purchasing upon these terms or to do without the goods and relied upon the inspection of gum shoe artists to see that their rights were not infracted by them. Not one witness of the defendant testified to the contrary.

Mr. Goodhart testified (page 322 of the record), that the discounts under Eastman were less than the normal discounts and that the only benefit plaintiff got out of the monopoly was to lose business and money, if this is a benefit, that when Eastman acquired a product, they immediately reduced the discount.

These two statements are clearly proven to be true by the loss sustained by plaintiff in its inability to handle Artura Paper when it was an independent concern at a discount of 40% from that Company, and the Eastman discount of 33 1-3% when acquired by that concern.

The Plaintiff in error has treated the Assignments of Error specified in the Brief as raising five questions which he designates, Points One to Five.

We will take them up in the order adopted by the Plaintiff in error. (Defendant below).

Point 1.

THIS POINT DEALS WITH THE QUESTION OF VENUE

The question here presented is, did the District Court acquire jurisdiction of the person of the defendant by service upon the defendant in the district of which it was an inhabitant The answer to this question is determined solely by the fact of whether or not the defendant transacted business in the Northern District of Georgia.

The record shows that Eastman did an enormous interstate business in the State of Georgia, and in the Northren District thereof, as well as an extensive local business. The defendant had one hundred and twenty-six customers in the State, who were dealers (Pages 752-756 of the record), handling kodaks and films, and the defendant distributed its merchandise to professional photographers through the Glenn Photo Stock Company which concern handled the Eastman line exclusively. The entire capital stock of the Glenn Photo-Stock Company was owned by the Eastman Kodak Company of New Jersey. The defendant's salesmen travelled the State; orders were taken from the retail dealers for merchandise, and sent to the Rochester office for acceptance, or to the New York branch office. When they were from regular customers, this branch office filled the orders without reference to the home office. The Eastman Company maintained demonstrators, who resided in Atlanta, Georgia (Pages 774-775 of the record), whose duties were to show both the retail dealers and the consumers how to use defendant's goods, and to convince them of their superiority. These demonstrators accepted orders from photographers and other consumers, and sent them to nearby retailers to be filled. The defendant also had its inspectors, resident in Atlanta, whose duty it was to visit its customers and ascertain if they were complying with the terms of sale, according to which goods manufactured by it could not

be re-sold by its customers except at prices fixed by it, and only to consumers, but not to other dealers; and could not be sold at all in competition with goods placed on the market by other manufacturers. (295 Fed., page 100).

The argument of the defendant and the numerous citations of authority are not in point.

The defendant proceeds upon the theory that the question of venue depends entirely upon whether or not the defendant had in the State of Georgia an Agent of such character as would bind the defendant by service upon such Agent. This was the law prior to the passage of Section 12 of the Clayton Act, October 15th, 1914.

The case of:

The Peoples Tobcaco Company, Ltd.
vs.
American Tobacco Company, 246 U. S. Page 79,

while decided by the Supreme Court March 14th, 1918, was begun in 1912 under the Sherman Act before the passage of the Clayton Act.

Clearly, therefore, this case is only authority as to what was necessary to acquire jurisdiction of the person prior to the passage of the Clayton Act.

We respectfully submit that the question of venue is foreclosed by the very terms of the Clayton Act of October 15th, 1914, 38 Stat. 736 (9 Fed. St. Ann. Page 744) Section 12 thereof, which provides:

> "That any suit, action or proceeding under the anti-trust laws against a **corporation** may be brought, not only in the judicial district whereof it is an inhabitant, but also **in any district wherein it** may be found or

> **transacst business,** and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found." (Bold face ours.)

Obviously this section was passed to enlarge the more restricted provision of Section 7 of the Act of July 2nd, 1890, and the Act of August 27th, 1894, Section 77.

The first of these, Section 7, provides:

> "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found without respect to the amount in controversy and shall recover three-fold the damage by him sustained and the cost of suit, including a reasonable attorney's fees." (26 Stat. L. 210) (Vol. 9, Fed. Stat. Ann. P. 713.)

The other, Section 77, provides:

> "That any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by ths Act, may sue therefor in any Circuit Court of the United States in the District in which the defendant resides or is found, without respect to the amount in controversy and shall recover three-fold the damage by him sustained and the cost of suit, including a reasonable amount as attorney's fees." (28 Stat. L 57, Fed. Stat Ann. Vol. 9 P. 748.)

Under the provision of the two sections conferring jurisdiction on a particular Circuit (now District Courts) in order to establish the venue of such Court in a District, other than that of which the defendant was an inhabitant, it was

necessary that such corporation be found within such District, that is the Corporation should not only be doing business in such District, but should have therein an Agent of such character as would authorize the service of process upon him.

The purpose of the Sherman and Clayton Act was to prevent unlawful trade combinations and monopolies in interstate trade and to compensate for the injury done to a person's business or property by reason of such unlawful trade combinations or monopolies of interstate trade.

It frequently happened that a defendant violating such law and inflicting injury upon the business or property of another by the business done in the district of such person was not subject to suit in such District, because of the absence therein of a representative Agent and the person so injured was compelled to resort to a District remote from his residence for the purpose of seeking redress.

The disparity of position between the litigants was thus, so great that to meet the situation, Section 12 of the Clayton Act was passed. This Section relieved the Plaintiff of having to find a representative Agent if the defendant Corporation was doing business in the District, by providing that where suit was brought in such District, service could be had in the District in which the defendant was an inhabitant or where it could be found.

Two District Courts have been called upon to construe the venue provision in Section 12 of the Clayton Act.

In the first of these:

Frey & Son vs. Cudahy Packing Co., 228 Fed. Page 209

suit was brought against the Cudahy Packing Company in

the District Court of Maryland. The defendant was doing an extensive and continuous interstate business in that District. Service was had upon an alleged Agent of the Corporation. The record is not clear as to whether this was a resident Agent or a representative merely passing though the State.

Judge Rose declined to decide whether or not the Agent was a Representative Agent, service upon whom would bind the Corporation, but stated that under Section 12 of the Clayton Act, quoted above, this question would be rendered immaterial if service were had in the District of which the defendant was an inhabitant. In the body of the opinion, the Court stated:

> "A non-resident corporation may be doing business in a District and therefore theoretically be liable to suit therein, but if it is not represented therein by an Agent upon whom process against it may be legally served, it cannot, against its will be brought into Court. The framers of the Clayton Act, however, have taken care that suits authorized by it shall not be so obstructed. The 12th Section of that statute **provides for the bringing of a Corporation into the Court of any District in which, under that Act, it may be sued,** by service of process upon it in any District of which it is an inhabitant, or wherein it may be found. If the defendant is properly suable in this District, the objection to the representative character of the so called Agent upon whom the process herein was served would not end the suit here. It could have no other effect than to delay the progress of the case until process could be served upon the defendant in the District in which it is an inhabitant." (Bold face ours.) (Page 210.)

And again on Page 211:

> "Congress doubtless meant to facilitate the redress

of wrongs done in violation of the anti-trust Act. It wanted to let a plaintiff sue wherever it was most convenient to him, provided injustice was not done a defendant. The provision in Section 12 for serving process in another District from that in which suit was instituted, itself took out of the plaintiff's way most if not all of the technical obstacles which had formerly obstructed it * * * * * A Corporation may be sued under this Statute where it transacts business. It cannot escape the obligation to respond because no Agent of the rank and charcter qualified to be served for it can there be found. Suit may be there brought and process may be issued to a district in which it cannot deny its liability to service."

The other case was the decision of Judge Newman in the instant case found in 234 Fed. page 955. On page 957, Judge Newman states:

"The conclusion to which I have come is this, that under Section 12 of the Clayton Act, suits may be brought in any judicial district whereof the Corporation is an inhabitant and also any district wherein it may be found, and in addition in any District wherein it transacts business; the process of course must be served in the District of which it is an inhabitant or wherein it may be found. The purpose of the Act was, I think, to give the Courts jurisdiction in any district in the Unitd States where a corporation transacts business, whether in the sense of the decisions it is 'found' there or not, and then that service on it may be perfected in its Home office in the District whereof it is an inhabitant or wherein it may be found; that is, 'found' as provided in the decisions construing that term."

If the business done is of an interstate character, this is

sufficient to authorize service of process, even under the Judicial Code.

> International Harvester Co. vs. Kentucky, 234 U. S. Page 579.

In that case, it was undisputed that the business done was entirely interstate. The Court said on page 587:

> "The contention comes to this, so long as a foreign Corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention."

The Harvester case was cited with approval in the case of

> Davis vs. Farmers' Co-operative Co., 262 U. S. Page 312.

On page 316, the court said:

> "The fact that the business carried on by a corporation is entirely inter-state in character, does not render the corporation immune from the ordinary process of the courts of the State."

In the instant case, suit is based upon a statute relating solely to inter-state commerce or business. Clearly, if the defendant is doing an inter-state business in the district where sued, it is doing business within the meaning of Section 12 of the Clayton Act.

While we cannot concede that the Clayton Act requires a local business rather than an inter-state business to support

the venue, yet the defendant can find no comfort here, for it did an extensive local business in the Northern District of Georgia through its demonstrators, resident in Atlanta in said District. (Record 774-775), sufficient in extent not only to support service of process but to sustain a local tax.

> Northwestern Consolidated Milling Co. vs. Mass., 246 U. S., page 155.

That Congress had the power to confer jurisdiction upon a District Court where the defendant was doing business and provide for service in the district of which it was an inhabitant, or can be found, has been too clearly settled to admit of dispute.

> United States vs. Union Pacific Railway Co., 98 U. S., page 569.

This suit was brought under a statute authorizing suit by the United States in any Circuit Court against the Union Pacific Railway Company, and any person or persons who had subscribed for or received stock in said road, which stock had not been paid for in full, and any who had received as dividend portions of the capital stock or the proceeds of sale thereof. Suit was brought in the Circuit Court of Connecticut against the Rrailroad Company and such other persons as were enumerated in the Act.

The constitutionality of this Act was challenged.

This court in upholding the jurisdiction said on page 604:

> "Whether parties shall be compelled to answer in a Court of the United States wherever they may be served or shall only be bound to appear when found within the District where suit has been brought, is

merely a matter of legislative discretion, which ought to be governed by considerations of convenience, expense, etc., but which when exercised by Congress is controlling on the Courts."

To the same effect is:

United States vs. Congress Construction Co., 222 U. S., Page 199,

in which this Court upheld that provision of the Material Mans Act of August 13, 1894, Chapt. 280, 28 Stat. 278 as amended Feb. 24th, 1905, Chapt. 778, 33 Stat. 811, providing that suit on a bond given under such act can only be brought in the District in which the contract was to be performed

Holding that this Act authorized Courts of such Districts to obtain jurisdiction of the person of the defendant through the service upon them of process in whatever District they may be found.

To the same effect:

Wainwright vs. Penn. Railroad Co., 253 Fed. 459,

which involved the venue of an action against Railroads as fixed by Congress under the Act of March 21st, 1919.

The constitutionality of this Act was challenged.

The Court held that the right to maintain an action in any particular court is always subject to the legislative will, that Congress had uniformly exercised this power by prescribing in what Courts suits may be maintained and in no instance has such an act been held void.

Citing the Union Pacific case supra and the Congress Construction Co. case supra and in addition,

Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186.
Hopkins vs. Ellington, 246 U. S. 25
Ex parte Southwestern Surety Insurance Co, 247 U. S. 19

and in addition the decision in the instant case by Judge Newman as reported in 234 Fed. 955.

That Section 12 of the Clayton Act enlarges the venue and determines whether or not suit can be brought in a particular district Court is pointed out by the Supreme Court of the United States.

General Investment Co. vs. Lakeshore, 260 U. S. Page 261.

This, the defendant will not recognize

In conclusion, we respectfully submit that the lower Court properly upheld its jurisdiction in the instant case, Section 12 of the Clayton Act is conclusive of the question and it is only necessary to see if the elements as defined by that Section exist in the instant case. Was the defendant doing an interstate business in the Northern District of Georgia and was service had in the District whereof the defendant was an inhabitant? Neither proposition is in dispute, consequently there can be no question as to the jurisdiction of the lower Court in this case.

POINT TWO.

THIS POINT DEALS WITH THE SUPPOSED APPLICATION OF THE DOCTRINE OF PARI DELICTO TO THE FACTS OF THIS CASE. AND PROCEEDS UPON THE THEORY THAT BECAUSE THE PLAINTIFF PURCHASED GOODS FROM THE DEFENDANT UNDER A CONTRACT WHICH WAS AN UNDUE RESTRICTION OF TRADE, THAT THE VEN-

DEE WOULD BE A PARTY TO THE ILLEGAL INTENT OF THE VENDOR, DESPITE THE FACT THAT THE VENDOR W LD NOT SELL TO THE VENDEE UPON ANY OTHER TERMS.

Two propositions are asserted as growing out of the supposed application of this doctrine:

First: the plaintiff is debarred from maintaining a suit.

Second: if the plaintiff can maintain a suit, he won't be permitted to prove any damage.

This latter contention is supposed to meet the situation where the act done in furtherance of the general scheme to create or to strengthen a monopoly is directed at the former customer, and shows upon its face that the customer was not a party to this act, but is the victim of such act, such as the refusal upon the part of the vendor to continue selling its former customer, and preventing the customer from thereafter securing goods of the kind and character so monopolized. Then the former customer would not be permitted to prove any damage as a result of such act, because of the illegal intent of the vendor.

In the instant case, it is clearly apparent that the plaintiff was not a party to the illegal refusal on the part of the defendant to sell to the plaintiff, but it is contended nevertheless that the plaintiff should not be permitted to recover because the plaintiff dealt with the defendant during the time that the illegal monopoly was being created.

Needless to say that when this illogical application of the doctrine of pari delicto reached this Honorable Court, it was disposed of in two lines, in the case of:

Charles A. Ramsey vs. Associated Bill Posters,

W. H. Rankin vs. Same Defendant, 260 U. S. page 501, to wit:

"We find no adequate support for the claim that the plaintiffs were parties to the combination of which they now complain."

These cases were dismissed on demurrer by the District Judge and affirmed by the Circuit Court of Appeals of the 2nd Circuit. (271 Fed. P. 140). It was reversed by the Supreme Court of the United States.

The Bill Posters Association had created a monopoly that licensed one Bill Poster in each town or city, prohibited the members from competing with each other, prevented these Bill Posters from accepting business from all advertisers who had given business to a non-member, maintained prices, furnished money to purchase competitors, prohibited the members from accepting work from any advertising solicitors except twelve who were licensed by the Association and prevented manufacturers by threats of withdrawal of business from them from furnishing posters to independent Bill Posters.

The plaintiff were advertising solicitors who were among the twelve that had licenses from the Association. The licenses were cancelled and they brought suit. Pari Delicto did not figure in that case and does not figure in the instant case.

It is surprising that this supposed application of the doctrine of pari delicto should have found the support that it did find in the second and third circuits, particularly as this Court has twice decided that the purchase of goods from one who was engaged in creating an illegal monopoly did not make an illegal relationship and upheld the right of the vendor to collect for the merchandise sold.

Connally vs. Union Pipe Company, 184 U. S. P. 540.
Wilder Mfg. Company vs. Corn Products Company, 236 U S. P. 165.

The case of:

Bluefields Steamship Company, vs. United Fruit Company, 243 Fed. P. 1-18,

is clearly not in point, for there the suit was predicated upon the illegal contract.

The contract itself, the subject matter of the suit was in violation of the Sherman Anti-Trust Act. The plaintiff was claiming rights under this contract.

In the ninth headnote Court said:

"The fact that the plaintiff did not reap the benefit expected, gives it no cause of action."

The case of:

Victor Talking Machine Co. vs. Kemeny, 271 Fed. 810 when properly considered is not in support of the defendant's contention, for in that case the plaintiff in the Lower Court was permitted to recover for the loss sustained by reason of the defendant's act, which prevented the plaintiff from thereafter acquiring the merchandise controlled by the defendant.

Eastman Kodak Company vs. Blackmore, 277 Fed. 694,

is likewise not in point, for in that case, plaintiff brought suit to recover damages for a loss sustained while he was actually handling the defendant's goods. The fact shows that he had been cut off by the Eastman Company in 1902 and reinstated in 1905. He was barred by the statute of limitations from recovering any loss during the period in

which he did not handle the defendant's goods. He sought to show a loss in the period covered by the suit due to the disorganization of his trade in an anterior period when he did not have the line, despite the fact that he had the goods and was able to supply the demand therefor during the period covered by the suit.

Blackmore in 1913, when handling the Eastman line, wrote to the Eastman Company, asking them to continue to do business under the terms of sale.

The case of Tilden vs. Quaker Oats Company, 1 F. (2d) page 160, has no resemblance to the instant case.

Tilden brought suit as receiver for the Great Western Cereal Company. The act complained of, and out of which the loss, it is claimed, arose, was the lawful act of the Great Western Company in selling its property to the Quaker Oats Company. This sale was necessitated by the illegal acts on the part of the Cereal Company's own officers and directors. In the instant case, the refusal of the Kodak Company to sell to the plaintiff was not by the plaintiff's consent. It was not a joint act, but it was a wrongful act on the part of the defendant, and this act caused the damage to the plaintiff.

The defendant makes the assertion that the plaintiff approved of the terms of sale and bases his whole argument of pari delicto thereon, contending that the plaintiff was a party to the intent and plan, and quoted from the testimony of the witness Goodhart (Page 171 of the record) as follows:

> "He explained the Eastman policy, went over it with us, that it was necessary to follow the policy or we could not obtain the goods. He told us that we would have to take them under the terms of sale or we could not get them at all. He gave us no option about it whatever. We bought these goods under the terms of sale."

The witness further stated:

> "To determine whether or not a dealer such as ours was complying with the terms of sale, the Eastman Kodak Company kept check through the demonstrators and salesmen and men who came around and watched you and checked you—we called them gum shoe artists. They would come to our store on an average of once every sixty days, sometimes oftener. They would look to see what merchandise we were handling, look at all of our merchandise. They would investigate our method of advertising and discuss it with us. At one time they made us change our method of doing business." (Page 179 of the record.)

Immediately following (Page 179 to 181) the witness gives in detail this incident where Robinson, one of the gum shoe artists, made him discontinue the premium advertising, which the witness did, rather than lose the Eastman line.

For any one to reach the strained conclusion that the plaintiff acquiesced and approved of the terms of sale by purchasing the Eastman goods upon the only terms upon which it could purchase them it necessarily implies that the purchase of such goods was an illegal act, in other words, that no one has a lawful right to engage in a lawful business.

The Sherman and Clayton Acts are based on the proposition that every one has the lawful right to engage in a lawful business and this has often been stated by the Supreme Court of the United States.

It is significant that this Court called attention to this in the Bill Posters case, supra, in which it disposed of the doctrine of pari delicto, in two lines, to-wit:

> "The fundamental purpose of the Sherman Act was

to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and strain of trade."

The decision in the Ramsey case of course disposes of Point Two of the Defendant's Brief.

We cannot close this portion of the Brief without calling attention to the logic of the defendant's position. If this contention could possibly be sustained, it means that under no circumstances would one violating the Sherman and Clayton Acts be subject to suit by other than the Government, regardless of the amount of loss or damage an individual might have sustained. If the monopoly would not permit a person to go in business, then of couse, this party could not proceed for damages, because the damage would be too uncertain and too speculative. The person who was in business during the creation of the monopoly and who secured his goods at the only available source could not maintain a suit under this theory, because of the fact that an illegal monopoly was being created and he would have no basis to measure his loss, because the profits made were made while the defendant was violating the law.

Clearly this court correctly disposed of this contention when they stated:

"There is no basis for it."

Stating the logic of the defendant's position, the defendant sets up his own wrong to defeat a recovery.

Clearly this proposition violates every rule of law or justice.

The most that could be said on the question of proof of damages is that if the income of the plaintiff was greater under the defendant's monopoly than it otherwise would

have been, such excessive gains should perhaps not be allowed, but only the income on the basis of what it would have been under normal conditions. The Court so charged the Jury. (Page 429-30 of the record.)

This at most was defensive matter and any element of uncertainty as to what the income would have been under normal conditions grows out of the defendant's wrong, not the plaintiff's. If the defendant failed to make this certain, the defendant should not be heard to complain.

This discussion is purely academic, as the defendant offered no such evidence. The plaintiff's testimony was to the contrary. It is true that E. H. Goodhart, witness for the plaintiff testified that Eastman advertised extensively, but the advertisement was of the goods and not of the illegal monopoly.

The whole supposition that the income of the plaintiff was excessive, due to the monopoly falls to the ground when contrasted with the 171% profit of the defendant. (Page 538 of the record.)

POINT THREE

THIS POINT DEALS WITH THE QUESTION OF DAMAGES.

It is important to emphasize that the question does not deal with the fact that loss resulted from the defendant's illegal act, but deals solely with the sufficiency of the evidence to show the extent of such loss.

We believe that the plaintiff does not intend to dispute the right to recover for an injury to an established business, resulting in the loss of income or profits from the operation

of such business. That a recovery can be had in such cases is too well settled to admit of dispute.

Sedgwick on Damages, 9th Edition, Volume 1, page 344, Section 182,

and the cases there cited.

Sutherland on Damages, Volume 3, p. 3207, Sections 867 and 869,

and the cases there cited.

The case of:

Central Coal and Coke Co. vs. Hartman, 111 Fed. 96, has been cited innumerable times by the Federal Courts. In each instance a recovery was allowed for the interruption of an established business, but no recovery permitted when the plaintiff claimed damages because prevented from entering into a business which was not then started.

A few of the cases involving the interruption of an established business are:

Lanier Gas Engine Co. vs. DuBois, 130 Fed. 834, 3rd Circuit.

Hollweg vs. Schaeffer Brokerage Co., 197 Fed. 689, 6th Circuit.

Yates vs. Wyhel Coke Co., 221 Fed. 603-7, 6th Circuit.

Homestead Co. vs. DesMoines Electric Co., 248 Fed. 439, 8th Circuit.

Frey & Son, Inc., vs Welch Grape Juice Co., 240 Fed. 114.

Lincoln vs. Orthwein, 120 Fed. 880, 5th Circuit.

The defendant's contention is that the extent of the dam-

ages was not proven with sufficient accuracy or with absolute certainty.

As stated above, the question deals solely with the sufficiency of the evidence.

Before going into the evidence, it is well to point out that the ruling as to certainty of damages is directed against the uncertainty as to cause, rather than uncertainty as to measure or extent. In other words, the rule against uncertain or contingent damage applies only to such damages as are not the certain result of the act, and not to such as are the certain results but uncertain in amount.

17 Corpus Juris, Sec, 90. P. 756 and cases there cited.

The case of Lincoln vs. Orthwein, 120 Fed. 880, states the rule in this language:

"Here it should be borne in mind that the difficulty of making direct proof springs, like the plaintiff's right to recover the damages, out of the wrongful act of the respondents who should not be suffered to reap advantage from their own wrong by requiring that kind of proof which their action has rendered it impossible or difficult for the plaintiff to obtain*****" (Page 886)

In that case, which involved a breach of contract the plaintiff showed profits he had made up to the time of the breach. The Court held that that was a sufficient basis upon which to determine the damage or loss sustained.

Necessarily had the defendant not monopolized interstate trade in professional photographic supplies and apparatus and illegally refused to sell to the plaintiff, exact figures could be adduced, showing the income which the plaintiff would have received from the sale of said goods during the period covered by the suit.

The inability to produce those figures grows out of the very act of the defendant which is the basis of the suit.

Clearly the inability to produce the figures should not therefore be of advantage to the wrong doer. All that the plaintiff is required to establish with absolute certainty is that the loss resulted from the act complained of. This of course is not in dispute.

When it is once established that damage resulted from the act complained of, then it is only necessary to approximate the extent of the loss or damage with the best evidence obtainable.

Lincoln vs. Orthwein, 120 Fed. 880, 4th H. N.

To show that the business was an established business and the usual profits or income therefrom anterior to the interruption is under all of the authorities sufficient evidence to approximate the extent of the damage, in fact, upon this evidence the July could reasonably conclude that during the period of interruption, the plaintiff would have received the same income that he had received prior thereto.

Cases cited, page 32 of this book.

In the instant case, the suit was brought to recover loss of income to an established business. The business continued in operation throughout the entire period covered by the suit. The loss of income is the loss of profits on sales which the plaintiff could have made during the period covered by the suit except for the defendant's illegal act.

In proving the damages in this case, but two factors must be shown.

FIRST. That a loss of income resulted from the defendant's illegal refusal to sell to the plaintiff.

The evidence is conclusive on this fact and is supported by the verdict of the Jury.

The evidence shows that the plaintiff could not secure goods of the kind and class that it had previously purchased from the defendant after the defendant's refusal to sell to the plaintiff. This was true because the defendant had illegally monopolized the trade in such articles.

It further appeared from the evidence that the plaintiff had an established business in such articles and that this business had been ten years in building. Plaintiff's customers after this act had to purchase these goods from others than the plaintiff.

So much for the fact of loss.

SECOND. The extent of the loss.

As stated above, the previous sales and the previous income would be sufficient evidence to authorize a verdict for the plaintiff and form the basis for the Jury to conclude that the same income would have been realized during the period of the suit.

Now we come to an analysis of the evidence.

The sales were detailed for a period of four years prior to the defendant's refusal to sell to the plaintiff. The gross profits on such sales were likewise shown. Plaintiff, of course, was not entitled to recover the gross profits. This would violate the principle of indemnity. The plaintiff could only recover the gross profit or income less such items of expense as were saved to it by reason of not actually making these sales.

The evidence shows that the plaintiff continued its business during the entire period covered by the suit, conse-

quently it still had the items of general expense, incident to carying on its business, such as administrative, organization and selling expenses. In fact, the evidence showed that the plaintiff continued to travel the territory and that his salesmen solicited orders continuously throughout this territory and from the plaintiff's regular trade.

The evidence shows that the plaintiff in continuing the operation of its business still had every expense incident thereto and incident to a sale of the goods which it could no longer obtain, except the actual expenses incident to handling these goods through its established business. This was detailed in the evidence and was shown to be 5% of the selling price. This is 6 6-10% of the cost price and represented merely the handling cost and the additional capital investment.

Furthermore, the evidence shows that the sales to professional photographers during the four-year period prior to the suit were made to 1335 professional photographer customers, but that during the two years of the suit, the plaintiff had incresaed its customers from this number to 2183 (Page 195 of the record.)

Clearly this evidence more than supports the deduction that the plaintiff would have sold the same amount of goods during the period covered by the suit that it did prior thereto, when during the period of the suit, plaintiff had increased its number of customers 60%.

Furthermore, the evidence shows that the plaintiff's sales per photographer dropped from $79.00 prior to the period covered by the suit to $36.09 per photographer during that period.

There was direct testimony that the plaintiff could not supply its customers more than 25% in kind and value of

the articles consumed by them in the operation of their studios. Surely this evidence was more than substantial data from which the extent of the damage could reasonably be inferred or determined by the Jury.

The verdict was in no sense commensurate with the extent of the loss sustained, even though the amount be trebled.

This is true not even considering that the plaintiff's business was a growing business, increasing from year to year in the number of its customers.

> Frey & Son, Inc., vs. Welch Grape Juice Co., 240 Fed. 114.

The defendant insists that all this evidence be disregarded and that the total annual sales of the plaintiff before the injury be compared with the total annual sales during the period covered by the suit, and then permit the defendant to escape the overwhelming logic of the plaintiff's case.

The defendant, in effect, says: "Ignore the fact that the plaintiff could no longer supply its established trade with a majority of the useful and necessary articles used by such trade and consider the fact that the plaintiff had increased its number of customers from 1335 to 2183 and give me the benefit of the total sales to the 2183 photographers as contrasted to the sales to the lesser number, and do this as a matter of law."

There is no casual relation between the defendant's refusal to supply the plaintiff with its merchandise and the growth of the plaintiff's business, as evidenced by the increase in the number of customers. Manifestly, this result does not follow as a matter of law.

The defendant, in effect, says: "Ignore the fact that the

plaintiff's sales per customer decreased from $79.00 to $36.09 per photographer and ignore the fact that during the period covered by the suit that the plaintiff's business was operated at only 50% of its capacity, but take into consideration that the ratio of expense during the two comparative periods remains substantially the same, although both the plaintiff's witnesses and the defendant's witness, Mr. H. D. Haight, testified that the expense of selling a complete line over an incomplete line under this situation would entail no additional cost other than the cost incident to handling such additional merchandise. (Page 382 of the record.)

It ought to need no testimony to call attention to the fact that if the volume of sales is increased without increasing the "going concern" charges, that the ratio of net profit is greater upon the increase than upon the former business.

The defendant says that the plaintiff, after being cut off by the defendant opened up another department, made more money and had more expenses and had more sales than prior thereto and again asked that the total figures during the two periods be contrasted, although the evidence is that the sales of amateur goods to retail dealers was not affected by the defendant's act, and that this business was complementary to the sales to professional photographers.

There is no inconsistency between the two departments. Both were handled like a jobbing business through salesmen. The plaintiff not only testified to this, but this is the testimony of the defendant's witness, Mr. H. D. Haight. (Page 383 and 384 of the record.)

The merchandise sold to professional photographers and that sold to side line houses for resale to amateurs were distinctive merchandise. It is true that the sale of Eastman goods to dealers had been controlled by them, but this was

due to the restrictions placed upon the stockhouses by Eastman and not to any inconsistency in the two departments.

That the two would develop side by side is shown by the fact that while the number of professional photographers increased from 1335 to 2183, the number of dealers increased from four in 1909 to 91 in 1911.

The sales to dealers during the period covered by the suit increased from $23,400.08 in 1910 to $74,924.31 in 1914.

The loss sustained by the plaintiff was clearly developed both as to nature and extent. The plaintiff with an established organization was a "going concern" with a demand for certain articles which it could not supply despite the fact that the plaintiff had every "going concern" expense incident to supplying such articles. The plaintiff lost the gross income on such articles less such items of expense as the plaintiff saved by reason of not handling these goods. These items of expense were both detailed by the witness, Goodhart, and by Mr. Haight.

We respectfully submit that taking the facts of this case and analyzing the evidence that it shows with unusual certainty, the extent of the loss that the plaintiff sustained and that the Trial Judge in the charge on the subject of uncertainty gave the defendant a more favorable charge than to which it was entitled.

POINT FOUR

The defendant tendered a number of issues in the Court below and all were submitted to the Jury and decided adversely to the defendant.

The Court charged the Jury that the defendant had a right to select its customers and if the refusal to sell the

plaintiff was an exercise of this right, the plaintiff could not complain and further charged as follows:

> "Or even, if knowing that they (plaintiff) were dealing with a competing Company, and they did not care to have the same man selling their goods who was selling competing goods, if there was nothing more to it than that, they could decline to sell their goods to the plaintiff at a discount or any other way."

As a matter of fact, the defendant did not in the Lower Court tender this issue, because the defendant could not claim that it had knowledge of the Ansco Contract at the time it discontinued selling the plaintiff and there is not one iota of evidence in the record of such knowledge.

If the Court will refer to the defendant's amendment (page 782 of the record) it will see that the issue tendered was whether or not the plaintiff had discontinued dealing with the defendant.

The amendment uses this language, after referring to the Ansco Contract, to-wit:

> "As a result of this business arrangement, defendant avers that the plaintiff voluntarily and of his own motion in the exercise of its business judgment terminated its relation with the defendant as a distributor of the defendant's products."

Surely in the state of the pleadings and evidence defendant has no ground for complaint on this issue. Whether or not the defendant discontinued dealing with the plaintiff as a part of its monopolistic plan or scheme or for some innocent reason was a question of fact, and this question of fact was decided adversely to the defendant.

Even by the wildest stretch of the imagination it could

not be contended that the plaintiff terminated its relations with the defendant.

Written orders for the defendant's merchandise were sent in and these orders rejected in writing. (Pages 165-9 of the record.) Subsequent to this refusal to deal with the plaintiff, the plaintiff attempted to purchase goods from the defendant, but without success. (Page 272 of the record.)

The evidence is overwhelming that the defendant discontinued dealing with the plaintiff for an illegal purpose. Defendant had just acquired two competing stock houses in Atlanta and one in New Orleans. The plaintiff had just taken on a line of amateur goods to sell to retail dealers. This, it is true, was stepping on the defendant's toes, as the defendant had rigorously maintained a monopoly in distributing its products to the retail dealers.

The evidence shows that the defendant, by refusing to sell to the plaintiff would control the business of selling to professional photographers through its subsidiary, the Glenn Photo Stock Company. If the plaintiff could be put out of business, the defendant would strengthen its monopoly both in the distribution of pressional apparatus and supplies and of amateur goods.

The defendant undertook to purchase the business of the plaintiff (Pages 154-64 of the record) and hired its head salesman and other employees (Page 164 of the record), then it refused to sell the plaintiff its goods.

That subsequent refusal of the defendant to sell to the plaintiff was all part and parcel of the plan of the defendant to monopolize the trade in photographic supplies is manifest, and such was found to be the fact by the jury, based upon the conclusive evidence before them.

See the testimony of Walter McElreath (pages 332-6 of the record.)

As a matter of fact, not one iota of evidence was introduced by the defendant as to why they refused to sell to the plaintiff.

The final judgment was totally inadequate to compensate plaintiff for the loss sustained by reason of the defendant's unlawful act, and we respectfully submit that the judgment of the lower court should be affirmed.

KING, SPALDING, MACDOUGALD & SIBLEY,

FOWLER & FOWLER,

Attorneys for Defendant-in-Error.

J. A. Fowler,
Daniel MacDougald,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1926.

Eastman Kodak Company of New York, Plaintiff in Error, *vs.* Southern Photo Materials Company.	In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 21, 1927.]

Mr. Justice Sanford delivered the opinion of the Court.

This suit was brought by the Southern Photo Materials Co., a Georgia corporation, in 1915, in the Federal District Court for Northern Georgia, against the Eastman Kodak Co., a New York corporation, to recover damages for injuries sustained by the plaintiff through the defendant's violation of the Sherman Anti-Trust Act.[1] Proceeding under § 12 of the Clayton Act,[2] process was issued and served upon the defendant, pursuant to an order of the court, at Rochester, New York, where it had its principal place of business. The defendant, appearing specially, traversed the return, entered a plea to the jurisdiction, and moved to quash the service. The jurisdictional issues thus raised were tried by the judge, who overruled these defenses. 234 Fed. 955. The defendant, by leave of court, then answered on the merits. The trial to the court and jury resulted in a verdict for the plaintiff assessing its actual damages at $7,914.66. Judgment was entered against the defendant for triple this amount and an attorney's fee. This was affirmed by the Circuit Court of Appeals. 295 Fed. 98. And the case was

[1]Act of July 2, 1890, c. 647, 26 Stat. 209. This Act makes it illegal, *inter alia*, to monopolize, or combine to monopolize, any part of the trade or commerce among the several States, § 2; and authorizes any person injured in his business or property by reason of anything declared to be unlawful by the Act, to sue therefor and recover three fold the damages sustained and a reasonable attorney's fee, § 7.

[2]Act of October 15, 1914, c. 323, 38 Stat. 730.

then brought here by writ of error, prior to the Jurisdictional Act of 1925.

The plaintiff operates a photographic stock house in Atlanta and deals in photographic materials and supplies, which it sells to photographers in Georgia and other Southern States. The defendant is a manufacturer of photographic materials and supplies, which it sells to dealers throughout the United States.

The case made by the allegations of the complaint was, in substance, this: The defendant, in violation of the Anti-Trust Act, had engaged in a combination to monopolize the interstate trade in the United States in photographic materials and supplies, and had monopolized the greater part of such interstate trade. This had been brought about by purchasing and acquiring the control of competing companies engaged in manufacturing such materials, and the businesses and stock houses of dealers; by restraining the vendors from re-entering these businesses; by imposing on the dealers to whom it sold goods restrictive terms of sale fixing the prices at which its goods could be resold and preventing them from handling competitive goods; and by other means of suppressing competition.

Prior to 1910 the plaintiff had dealt with the defendant and purchased its goods on the same terms as other dealers, with whom it was enabled to compete; but in that year the defendant, having acquired the control of the stock houses in Atlanta which were in competition with the plaintiff and unsuccessfully attempted to purchase the plaintiff's business, had, in furtherance of its purpose to monopolize, thereafter refused to sell the plaintiff its goods at the dealers' discounts, and would no longer furnish them except at the retail prices at which they were sold by other dealers and the agencies which the defendant owned and controlled, with whom the plaintiff could no longer compete. And, the plaintiff being thus deprived, by reason of the monopoly, of the ability to obtain the defendant's goods and supply them to its trade, its business had been greatly injured and it had sustained large damages in the loss of the profits which it would have realized in the four years covered by the suit had it been able to continue the purchase and sale of such goods.

The answer denied that the defendant had combined to monopolize or monopolized interstate trade, or refused to sell its goods to the plaintiff at the dealers' discounts in furtherance of a pur-

pose to monopolize; and averred that the defendant had not only committed no actionable wrong, but that in any event the plaintiff had sustained no damages capable of ascertainment upon any legal basis.

While many errors were assigned, some of which were also specified, in general terms, in the defendant's brief in this Court, we confine our consideration of the case in this opinion to the controlling questions which are stated in that brief to present the chief issues here in controversy, and to which alone the argument in the brief is directed. See *I. T. S. Co.* v. *Essex Rubber Co.*, decided November 22, 1926. These do not involve the existence of the defendant's monopoly—which is not questioned here[3] — but relate solely to the questions whether there was local jurisdiction or venue in the District Court; whether the refusal of the defendant to continue to sell the plaintiff its goods at the dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong which could form the basis of any recovery; and whether there was any competent and legal proof on which a measurement of the plaintiff's damages could be based.

1. Whether or not the jurisdiction of the District Court was rightly sustained—which resolves itself into a question whether the venue of the suit was properly laid in that court—depends upon the construction and effect of § 12 of the Clayton Act and its application to the facts shown by the evidence set forth in the separate bill of exceptions relating to the hearing on the jurisdictional issues. *Dunlop* v. *Munroe*, 7 Cranch 242, 270; *Jones* v. *Buckell*, 104 U. S. 554, 556.

It appears from this evidence that the defendant—which resides and has its principal place of business in New York — had not registered in Georgia as a non-resident corporation for the purpose of doing business in that State, and had no office, place of business or resident agent therein. It had, however, for many years prior to the institution of the suit, in a continuous course of business, carried on interstate trade with a large number of photographic dealers in Atlanta and other places in Georgia, to whom it sold

[3]The plaintiff's allegations in this respect were supported on the trial by a final decree that had been entered in 1916 in another District Court in a suit in equity brought by the United States against the defendant and others, which the plaintiff introduced, under § 5 of the Clayton Act, as *prima facie* evidence of the defendant's violation of the Anti-Trust Act.

and shipped photographic materials from New York. A large part of this business was obtained through its travelling salesmen who visited Georgia several times in each year and solicited orders from these dealers, which were transmitted to its New York offices for acceptance or rejection. In furtherance of its business and to increase the demand for its goods, it also employed travelling "demonstrators," who visited Georgia several times in each year, for the purpose of exhibiting and explaining the superiority of its goods to photographers and other users of photographic materials. And, although these demonstrators did not solicit orders for the defendant's goods, they took at times retail orders for them from such users, which they turned over to the local dealers supplied by the defendant.

It is clear that upon these facts this suit could not have been maintained in the Georgia district under the original provision in § 7 of the Anti-Trust Act that anyone injured in his person or property "by any other person or corporation" by reason of anything declared to be unlawful by the Act, might sue therefor "in the district in which the defendant resides or is found."[4] In *Peoples Tobacco Co.* v. *Am. Tobacco Co.*, 246 U. S. 79, 84, 86—decided in 1918—it was held that this provision, as applied to a corporation sued in a district in which it did not reside, required that it "be present in the district by its officers and agents carrying on the business of the corporation," this being the only way in which it could be said to be "found" within the district; that to make it amenable to service of process in the district, the business must be of such nature and character as to warrant the inference that it had subjected itself to the local jurisdiction, and was by its duly authorized officers or agents present therein; and that advertising its goods in a state and sending its soliciting agents therein, did not amount to "that doing of business" which subjected it to the local jurisdiction for the purpose of serving process upon it.

Manifestly the defendant was not present in the Georgia district through officers or agents engaged in carrying on business of such character that it was "found" in that district and was amenable to the local jurisdiction for the service of process.

[4] A like provision was contained in the Tariff Act of 1894, 28 Stat. 509, c. 349, which made illegal combinations and trusts in restraint of import trade. §§ 73, 74.

However, by the Clayton Act—which supplemented the former laws against unlawful restraints and monopolies of interstate trade —the local jurisdiction of the district courts was materially enlarged in reference to suits against corporations. By § 4 of that Act it was provided that any person "injured in his business or property by reason of anything forbidden in the antitrust laws" might sue therefor in the district "in which the defendant resides or is found or has an agent." Whether, as applied to suits against corporations, as distinguished from those against individuals, the insertion of the words "or has an agent" in this section can be held, in the light of the decision in the *Peoples Tobacco Co.* case, to have enlarged to any extent the jurisdictional provision in § 7 of the Anti-Trust Act, we need not here determine. Be that as it may, it is clear that such an enlargement was made by § 12 of the Clayton Act—dealing specifically with the venue and service of process in suits against corporations—under which the plaintiff proceeded in the present case. This provided that "any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found *or transacts business;* and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." That this section altered the venue provisions in respect to suit under the anti-trust laws was pointed out in *General Inv. Co.* v. *Lake Shore Ry.*, 260 U. S. 261, 279. And we think it clear that, as applied to suits against corporations for injuries sustained by violations of the Anti-Trust Act, its necessary effect was to enlarge the local jurisdiction of the district courts so as to establish the venue of such a suit not only, as theretofore, in a district in which the corporation resides or is "found", but also in any district in which it "transacts business"—although neither residing nor "found" therein—in which case the process may be issued to and served in a district in which the corporation either resides or is "found"; and, further, that a corporation is engaged in transacting business in a district, within the meaning of this section, in such sense as to establish the venue of a suit—although not present by agents carrying on business of such character and in such manner that it is "found" therein and is amenable to local process,—if in fact, in the ordinary and usual sense, it "transacts business" therein

of any substantial character. This construction is in accordance, not only with that given this section by the two lower courts in the present case, but also with the decisions in *Frey & Son* v. *Cudahy Packing Co.* (D. C.), 228 Fed. 209, 213 and *Haskell* v. *Aluminum Co. of America* (D. C.), 14 F. (2d) 864, 869. And see *Green* v. *Chicago, B. & Q. Ry.*, 205 U. S. 530, 533, in which it was recognized that a corporation engaged in the solicitation of orders in a district was in fact "doing business" therein, although not in such sense that process could be there served upon it.

We are further of opinion that a corporation is none the less engaged in transacting business in a district, within the meaning of this section—which deals with suits respecting unlawful restraints upon interstate trade—because of the fact that such business may be entirely interstate in character and be transacted by agents who do not reside within the district. And see *International Harvester* v. *Kentucky*, 234 U. S. 579, 587; *Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312, 316.

Thus construed, this section supplements the remedial provision of the Anti-Trust Act for the redress of injuries resulting from illegal restraints upon interstate trade, by relieving the injured person from the necessity of resorting for the redress of wrongs committed by a non-resident corporation, to a district, however distant, in which it resides or may be "found"—often an insuperable obstacle —and enabling him to institute the suit in a district, frequently that of his own residence, in which the corporation in fact transacts business, and bring it before the court by the service of process in a district in which it resides or may be "found."

To construe the words "or transacts business" as adding nothing of substance to the meaning of the words "or is found," as used in the Anti-Trust Act, and as still requiring that the suit be brought in a district in which the corporation resides or is "found," would to that extent defeat the plain purpose of this section and leave no occasion for the provision that the process might be served in a district in which the corporation resides or is found. And we find nothing in the legislative proceedings leading to its enactment which requires or justifies such a construction.

That Congress may, in the exercise of its legislative discretion, fix the venue of a civil action in a federal court in one district, and authorize the process to be issued to another district in which

the defendant resides or is found, is not open to question. *United States* v. *Union Pacific R. R. Co.*, 8 Otto 569, 604; *Robertson* v. *Labor Board*, 268 U. S. 619, 622.

And, since it appears from the facts already stated that the defendant, in a continuous course of business, was engaged, not only in selling and shipping its goods to dealers within the Georgia district, but also in soliciting orders therein through its salesmen and promoting the demand for its goods through its demonstrators for the purpose of increasing its sales, we conclude that it was transacting business in that district, within the meaning of § 12 of the Clayton Act, in such sense as properly established the venue of the suit; that it was duly brought before the court by the service of process in the New York district, in which it resided and was "found;" and that its jurisdictional defenses were rightly overruled.

2. On the question whether the defendant's refusal to sell its goods to the plaintiff at dealers' discounts was in furtherance of a purpose to monopolize and constituted an actionable wrong, the defendant contends not only that there was no direct evidence as to the purpose of such refusal overcoming the presumption that it was a lawful one, but that such refusal was justified by the fact that the plaintiff had previously undertaken to handle the goods of another manufacturer under a preferential contract. Aside from the plaintiff's contention that this contract related merely to goods that did not conflict with the sale of those which it had been purchasing from the defendant, it was not shown that the defendant knew of this contract when it refused to sell its goods to the plaintiff. And for this reason, if for no other, we think that the trial court rightly declined to charge the jury to the effect that such taking over of other goods by the plaintiff in itself justified the defendant in its refusal to sell to the plaintiff. And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purpose, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. "Clearly," as was said by the Court of Appeals, "it could not be held as a matter of law that the defendant was actuated by innocent motives rather than by an intention and desire to perpetuate a monopoly." This question was submitted under proper instruc-

tions. And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact. *Crumpton* v. *United States,* 138 U. S. 361, 363; *Anvil Mining Co.* v. *Humble,* 153 U. S. 540, 554. And see *Johnson* v. *United States,* 157 U. S. 320, 326; *Goldman* v. *United States,* 245 U. S. 474, 477.

3. On the question of the amount of damages, there was substantial evidence to the effect that prior to 1910 the plaintiff had an established business in selling supplies used by professional photographers, of which it carried a complete line, purchased in large part from the defendant; that the defendant sold to dealers such supplies only; that shortly before the defendant's refusal to continue the sale of its goods the plaintiff also took on a complete line of goods used by amateurs, which did not conflict with its sales to professional photographers; that after the defendant's refusal, the plaintiff was unable, by reason of the defendant's monopoly, to obtain and supply the greater part of the goods necessary to professional photographers, and lost its established trade in such goods; that its trade with professional photographers greatly decreased; and that its business was so organized that it would have been able to continue to handle the defendant's goods during the period in suit with no increase in its general expenses and no additional cost except that incident to the handling of such goods themselves—its business being operated during such period at only two-thirds of its capacity. The plaintiff's claim was that under these circumstances it was entitled to recover, as the loss of profits which it would have realized had it been able to continue the purchase of defendant's goods, the amount of its gross profits on the defendant's goods during the four years preceding the suit, which was shown, less the additional expense which it would have incurred in handling the defendant's goods during the four years' period in suit, which was estimated.

The defendant—while conceding that the loss of anticipated profits from the destruction or interruption of an established business may be recovered where the amount of the loss is made reasonably certain by competent proof, *Central Coal & Coke Co.* v. *Hartman* (C. C. A.), 111 Fed. 96, 98—contends that there was a lack of competent proof of such damages in that the profits earned by the plaintiff during the preceding four years in which it had been

a customer of the defendant, were improperly used as a standard by which to measure the damages sustained by the plaintiff during the period covered by the suit, since during such preceding years it had participated in the defendant's unlawful acts in furtherance of the monopoly and was *in pari delicto.*

There was, as stated by the Court of Appeals, evidence from which the jury could justly reach the conclusion that the plaintiff was not a party to the monopoly *in pari delicto* with the defendant, and that the plaintiff had complied with the defendant's restricted terms of sale merely for the reason that otherwise it could not purchase or secure the goods necessary in the conduct of its business. There was also affirmative evidence, not contradicted, tending to show that under the defendant's restricted terms of sale the dealers' profits did not exceed those on the sale of goods of other manufacturers not parties to the monopoly.

The jury was instructed, in substance, that if, during the preceding period in which the plaintiff had been a customer of the defendant, it had not merely bought goods from the defendant because of a business necessity, but, with a knowledge of the defendant's purpose to monopolize, had knowingly and willfully helped to build up the monopoly, it was *in pari delicto,* and hence could not recover any damages whatever on account of the defendant's refusal to continue to sell it goods; and, further, that even if the plaintiff had not been a party to the monopoly, it could not recover damages on the basis of the profits which it had earned while a customer of the defendant to the extent that they had been increased by the monopoly and exceeded those in a normal business, but that they must be reduced to the basis of normal profits.

We find, under the circumstances of this case, nothing in these instructions of which the defendant may justly complain. See *Ramsay Co.* v. *Bill Posters Assn.,* 260 U. S. 501, 502. The statement in *Victor Talking Mach. Co.* v. *Kemeny* (C. C. A.), 271 Fed. 810, 819, on which the defendant relies was based on the assumptions that the plaintiff had not only been a party to the unlawful combination, but that his earlier profits had exceeded those which "he could earn lawfully in a competitive market." And in *Eastman Kodak Co.* v. *Blackmore* (C. C. A.), 277 Fed. 694, 699, the substance of the holding was that the profits made by the plaintiff during an earlier period ending in 1902, in which he had actively

participated in the unlawful combination, could not be set up as the standard of the profits which he would have realized in a much later period commencing in 1908.

The defendant further contends that, apart from this question the plaintiff's damages were purely speculative, not proved by any facts from which they were logically and legally inferable, and not of an amount susceptible of expression in figures, *Keogh* v. *C. & N. W. Ry. Co.*, 260 U. S. 156, 165. In support of this contention it is urged in argument, *inter alia*, that there was no showing as to the separate cost of handling the defendant's goods during the preceding four years; that if the plaintiff's entire business be considered as a unit and the total expenses and costs of goods be deducted from the entire receipts, it is shown to have had a net loss in the two years preceding 1910, but to have made a substantial net profit in that and the succeeding year; that the estimate as to the additional expense which the plaintiff would have incurred in handling the defendant's goods during the period in suit, was purely conjectural and speculative; and that it was a mere assumption, discredited by the testimony, that the plaintiff could have sold as large a quantity of the defendant's goods during the period in suit, after taking over a line of other goods, as it had before.

As to this question the Court of Appeals—after stating that in its opinion the plaintiff's evidence would have supported a much larger verdict than that returned by the jury—said: "The plaintiff had an established business, and the future profits could be shown by past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." This, we think, was a correct statement of the applicable rules of law. Furthermore, a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible. *Hetel* v. *Baltimore & Ohio R. R.*, 169 U. S. 26, 39. And see *Lincoln* v. *Orthwein* (C. C. A.), 120 Fed. 880, 886.

We conclude that plaintiff's evidence as to the amount of damages, while mainly circumstantial, was competent; and that it sufficiently showed the extent of the damages, as a matter of just and reasonable inference, to warrant the submission of this question to the jury. The jury was instructed, in effect, that the amount of the damages could not be determined by mere speculation or guess, but must be based on evidence furnishing data from which the amount of the probable loss could be ascertained as a matter of reasonable inference. And the question as to the amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is conclusive.

The judgment is accordingly

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.